Supreme Court, U.S.
FILED
051387 MAY 1 - 2006
OFFICE OF THE CLERK

No. 05-

IN THE

Supreme Court of the United States

LARRY ALAN WARCH,

Petitioners,

v.

THE OHIO CASUALTY INSURANCE COMPANY,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

PETITION FOR A WRIT OF CERTIORARI

LEE BOOTHBY
Counsel of Record for Petitioner
1717 K Street, NW
Suite 600
Washington, DC 20016
(202) 466-0976

QUESTIONS PRESENTED

1. When assessing whether a plaintiff has met his employer's job qualifications at the prima facie stage of an age discrimination case, must a terminated employee also show that he continues to meet the employer's legitimate job expectations?

2. Whether a plaintiff must always show that he was replaced by a substantially younger employee to establish a prima facie case in an age discrimination action or whether the fourth element of the *McDonnell Douglas* formulation may take on various formulations including evidence of statements by management showing stereotypical age animus.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

TABLE OF AUTHORITIES iv

OPINIONS BELOW 1

JURISDICTION 1

STATUTORY AUTHORITY 1

STATEMENT OF FACTS 1

A. Relevant Facts 1
1. Warch's Prior Related Employment 2
2. Warch's Employment At Ohio Casualty Insurance Company 3
B. Proceedings Below 5

REASONS FOR GRANTING THE PETITION 7

1. There Is A Split In The Circuits, Which Now Should Be Resolved, As To Whether An Employee Must Show That He Has Met His Employer's Performance Expectations At The Prima Facie Stage 7

A. The Fourth Circuit's Reasoning Has Been Rejected By Other Circuits ... 7

B. The Decision Below Is Inconsistent With The Prior Reasoning Of This Court 9

Page

C. The Lower Court's Decisions Are Erroneous. 14

D. The Circuits' Split Should Be Resolved Now. 16

2. Contrary To The Fourth Circuit's Holding, Other Circuits Do Not Require That A Plaintiff Show That He Was Replaced By A Substantially Younger Employee As Part Of A Prima Facie Case. 16

A. The Fourth Prong Of A Prima Facie Case Must Be Flexible And Vary With The Circumstances 17

B. The Decisions Below Are Erroneous. 20

CONCLUSION 24

APPENDIX 1a

Opinion of the Fourth Circuit Court of Appeals (Appendix A) 1a

Opinion of the District Court (Appendix B) 21a

TABLE OF AUTHORITIES

Page

Cases

Aka v. Washington Hosp. Ctr.,
156 F.3d 1284 (D.C. Cir. 1998) 8-9

Bienkowski v. American Airlines, Inc.,
851 F.2d 1503 (5th Cir. 1988) 7

Causey v. Balog, 162 F.3d 795 (4th Cir. 1998) 17,18

Cengr v. Fusibond Piping Systems, Inc.
135 F.3d 445 (7th Cir. 1998) 23

Cline v. Catholic Diocese of Toledo,
206 F.3d 651 (6th Cir. 2000) 7,11,12,13,14

Collier v. Budd Co., 667 F.3d 886 (7th Cir. 1995) 17

Commissioner v. Bilder, 369 U.S. 499 (1962) 16

Dey v. Colt Const. & Devel. Co.
28 F.3d 1446 (7th Cir. 1994) 21

EEOC v. Wyoming, 460 U.S. 226 (1983) 19

Furnco Const. Co. v. Waters, 438 U.S. 567 (1978) 23

Hazen Paper Co. v. Biggins, 507 U.S. 604 (1993) 19

Jayasinghe v. Bethlehem Steel Corp.,
760 F.2d 132 (7th Cir. 1985) 16

TABLE OF AUTHORITIES - Continued

Page

Loeb v. Textron, Inc., 600 F.2d 1003 (1st cir. 1979) 7

Lovelace v. Sherwin-Williams Co.,
681 F.2d 230 (4th Cir. 1982) 7

MacDonald v. Eastern Wyoming Mental Health Center,
941 F.2d 1115 (10th Cir. 1991) 9

Massachusetts Trustees v. United States,
377 U.S. 235 (1965) 16

Medina v. Ramsey Steel Co.,
238 F.3d 674 (5th Cir. 2001) 15

Moore v. Sears, Roebuck & Co.,
464 F. Supp. 357 (N.D. Ga. 1979) 23

Montana v. First Federal S. & L. Of Rochester,
869 F.2d 100 (2d Cir. 1989) 22

O'Connor v. Consolidated Coin Caterers Corp.,
517 U.S. 308 (1996) 17

Powell v. Syracuse University,
580 F.2d 1155 (2d Cir. 1978) 8

Reeves v. Sanderson Plumbing Products, Inc.,
530 U.S. 133 (2000) 10

Shager v. Upjohn Co., 913 F.2d 398 (7th Cir. 1990) 22

TABLE OF AUTHORITIES - Continued

Page

St. Mary's Honor Ctr. v. Hicks,
509 U.S. 502 (1992) 9,10

Texas Dept. Of Community Affairs v. Burdine,
450 U.S. 248 (1981) 11

Thornbrough v. Columbus & Greenville R. Co.
760 F.2d 633 (5th Cir. 1985) 15

Troupe v. May Dep't Stores Co.,
20 F.3d 734 (7th Cir. 1991) 21

U.S. Postal Service Bd. Of Governors v. Aikens,
460 U.S. 711 (1978) 10

Walker v. Mortham, 158 F.3d 1177 (11th Cir. 1988) 14

Wells v. New Cherokee Corp.,
58 F.3d 233 (6th Cir. 1995) 22

Wexler v. White's Fine Furniture, Inc.,
317 F.3d 564 (6th Cir. 2003) 8

Zimmitti v. Aetna Life Ins. Co.,
64 F. Supp.2d 69 (D. Conn. 1999) 19

Statute

29 U.S.C. §§ 623(a)(1) 1

OPINIONS BELOW

The opinion of the Fourth Circuit (App., *infra*, beginning at 1a) is reported at 435 F.3d 510. The opinion of the district court (App., *infra*, beginning at 21a) is unreported.

JURISDICTION

The court of appeals entered its opinion and judgment on January 30, 2006. This Court's jurisdiction rests on 28 U.S.C. § 1254(1).

STATUTORY AUTHORITY

The Age Discrimination in Employment Act of 1967, as amended, at 29 U.S.C. §623 (a) states "It shall be unlawful for an employer-(1) to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age."

STATEMENT OF FACTS

A. Relevant Facts

Larry Alan Warch brought this action against his former employer, the Ohio Casualty Insurance Company ("OCIC"), where he was employed in the Special Investigation Unit ("SIU") as a fraud investigator. His complaint alleged that his employer unlawfully discriminated against him based upon his age (59) when it fired him.

The district court granted OCIC's motion for summary judgment rejecting Warch's prima facie case and holding that

he failed to establish two of the four required elements of a prima facie case. Specifically, the court held that he: (a) had not met his employer's legitimate job performance expectations; and (b) had failed to produce sufficient evidence that he was replaced by a substantially younger employee. Finally, the district court held that Warch had not established a "mixed motive" claim.

The Fourth Circuit affirmed the district court's holding although acknowledging a split with the Sixth Circuit Court of Appeals as to whether or not, at the prima facie stage, an employee must show that he was meeting his employer's legitimate job performance expectations.

This case presents issues relating to what is required of a plaintiff at the prima facie stage of an age discrimination case and concerns questions that the circuits have been split over for a long time and over which there is still disagreement.

1. Warch's Prior Related Employment

From October of 1989 to November of 1992, Warch was employed by Cigna Property and Casualty Insurance Companies. In that job his duties involved the investigation and evaluation of first and third party property damage and bodily injury claims to include automobile and general liability lines of business. JA 64 ¶ 6.[1]

From November of 1992 until March of 1993, Warch was employed by the State of Maryland Mass Transit

---

[1] "JA __" refers to the Joint Appendix filed in the court of appeals. "JA(S)__" refers to the sealed portions of the Joint Appendix.

Administration as a Claims Representative. In that position he investigated and evaluated first and third party property damage and bodily injury claims to include automobile and general liability lines of business. JA 64 ¶ 7.

From March of 1995 to January of 1994, Warch was employed by Kemper National Insurance Company as a Claims Representative. Again, he continued to investigate and evaluate first and third party property damage and bodily injury claims to include automobile and general liability lines of business. JA 64 ¶ 8.

From January of 1994 until Ohio Casualty purchased the commercial lines of The Great American Insurance Companies, Larry Warch was employed by Great American as a Special Investigator in its Special Investigation Unit. It was his intent to complete his working career at Great American and eventually retire from there. During his tenure with Great American, he turned down other higher paying employment opportunities because he enjoyed working at Great American. JA 65 ¶ 9. At Great America, Warch was rated "competent plus." JA 240, 242.

2. Warch's Employment At Ohio Casualty Insurance Company

When defendant, Ohio Casualty Insurance Company, purchased from Great American its commercial product line, those employees employed by Great American as SIU investigators were able to apply for employment with Ohio Casualty as SIU investigators. Warch was hired by defendant as a Special Investigation Unit Investigator I on December 1, 1998, the date the purchase became effective. JA 65 ¶10.

Warch's work at Ohio Casualty was progressing well,

and the only criticism he received from SIU management was about the way he kept his files organized. He quickly corrected that problem. Warch's investigations were never criticized until the SIU unit came under new management. JA 65 ¶ 12.

In the year 2000, the company decided to change the management of the SIU from home office control to regional control. Bill Johannsen, who had worked many years at Ohio Casualty, was its manager, and also served as an Assistant Vice President of Ohio Casualty, was terminated. Supervisor Bradley Bennett was kept on during the transition from home office control to regional control. Tommy Evans and Larry Warch were assigned to be investigators in the Raleigh Regional Office. Warch continued to receive above average performance ratings from the Raleigh management. JA 65-66 ¶¶ 13 & 14. Prior to Bruce Montgomery's taking over the SIU early in 2001, Warch's performance rating was "Effective" in all categories. JA 66 ¶ 14; JA 238-239; JA(S) 303-506, 1748, 1754.

In fact, at a meeting held on June 25, 2001 (after Montgomery had become Director of SIU), a conference call was held with Bruce Montgomery, Bob Eades (Warch's supervisor at Raleigh), and Larry Warch in order to evaluate Warch's 2000 performances. During this meeting Warch received an overall rating of "Good" and received a 3% merit increase in his salary. This meant an increase in his annual salary from $48,927.06 to $50,394.87 which became effective June 7, 2001. JA 68-69 ¶ 23; JA(S) 238-239, 326-327. According to his prior supervisor (during home office control of the SIU), Warch, in fact, "was qualified and performed well above the level acceptable for an SIU Investigator II position at Ohio Casualty." JA 76,79 ¶ 13.

Almost immediately after taking control of the SIU unit

in early 2001, Bruce Montgomery manipulated an audit of the two SIU investigatiors working out of the Raleigh office so as to claim poor performance by Warch (JA 76, 82). From that time on, Warch was the target of subjective criticism and disciplinary action by Montgomery and his assistant, Robert Burgess.

Around the time of Warch's firing, both Burgess, Warch's immediate supervisor, and Montgomery, the Director of the SUI unit, made almost identical statements to the effect that people who were of a certain age (apparently age 46 or above) did not produce like younger people. JA 208-214. There were also other indications of age discrimination. JA(S) 318-323, 332-333, 335-336.

Although David Hasler, whose department included the SIU unit, claims to have made the decision to fire Warch, Hasler, in fact, knew nothing of Warch's situatior other than what Bruce Montgomery told him (JA 141, 145-149, 156-158). The decision to fire Warch was made jointly by Hasler and Montgomery.

B. Proceedings Below

The employer filed a motion for summary judgment in the district court basing its motion on the claim that Warch had not made out a prima facie case of age discrimination. The principal argument made by Ohio Casualty was that at the prima facie stage the plaintiff was required, in addition to demonstrating his basic qualifications for the position, to shoulder the additional burden of establishing that his work performance continued at the requisite level of the employer's expectations.

The court of appeals "reject[ed] Warch's contention that

consideration . . . [of Warch's work performance] at the prima facie stage improperly allow[ed] consideration of evidence the employer would typically present in the second stage of the *McDonnell Douglas* framework, that is, where the employer offers the legitimate, non-discriminatory reason for the termination." App., infra, 7a-8a.

The court of appeals acknowledged that Warch's position was supported by "the approach announced in *Cline v. Catholic Diocese of Toledo*, 206 F.3d 651 (6th Cir. 2000), which held that, 'when assessing whether a plaintiff has met her employer's legitimate expectations at the prima facie stage of a termination case, a court must examine plaintiff's evidence independent of the nondiscriminatory reason "produced" by the defense as the reason for terminating plaintiff.' *Id.* at 660-61." App., infra 8a.

The court of appeals noted its disagreement with the decision in *Cline* "because [according to the Fourth Circuit] a plaintiff must show by a preponderance of the evidence that he met the employer's legitimate job expectations to prove his prima facie case . . . ." App., infra, 9a.

The Fourth Circuit also held that Warch's prima facie case also fails because he did not produce sufficient evidence from which a reasonable jury could decide that he was replaced by a substantially younger employee. *Causey v. Balog*, 162 F.3d 795, 802 n.3 (4th Cir. 1998). App., infra, 15a.

Lastly, the court of appeals rejected Warch's "mixed motive" claim. The court concluded that age comments made by Warch's supervisors to the effect that a job candidate who happened to be similar in age and experience to Warch would have a difficult time getting a job because people his age don't work as hard as those younger was not sufficient to create a

genuine dispute on his claim under the mixed motive approach. (App., infra, 18a).

REASONS FOR GRANTING THE PETITION

1. There Is A Split In The Circuits, Which Now Should Be Resolved, As To Whether An Employee Must Show That He Has Met His Employer's Performance Expectations At The Prima Facie Stage.

As the Fourth Circuit acknowledged (App., infra, 10a), its decision in this case directly conflicts with *Cline v. Catholic Diocese of Toledo*, 206 F.3d 651 (6th Cir. 2000). The court below stated that at the prima facie stage, the terminated employee is required to show that he continues to meet the employer's legitimate expectations for job performance, not only that he is qualified for the job (App., infra, 6a). The Fourth Circuit based its decision on an earlier holding, *Lovelace v. Sherwin-Williams Co.*, 681 F.2d 230 (4th Cir. 1982), and the First Circuit's decision in *Loeb v. Textron, Inc.*, 600 F.2d 1003, 1013 (1st Cir. 1979). The position taken by the court in *Loeb* has been repeatedly rejected by other circuits.

The court in *Loeb* held that a prima facie case requires the employee to demonstrate "that he was 'qualified' in the sense that he was doing his job well enough to rule out the possibility that he was fired for inadequate job performance, absolute or relative." *Id.*

A. The Fourth Circuit's Reasoning Has Been Rejected By Other Circuits.

But the Fifth Circuit in *Bienkowski v. American Airlines, Inc.*, 851 F.2d 1503 (5th Cir. 1988), specifically rejected the reasoning in *Loeb* stating:

> Although the *Loeb* approach has some appeal as a matter of principle, we cannot reconcile it with the Supreme Court's attempt in *McDonnell Douglas* and *Burdine* to simplify presentation of an employment discrimination case. Placing plaintiff's "qualifications" in issue at both the prima facie case and pretext stages of a termination case is an unnecessary redundancy.... The requirement that a plaintiff prove he is meeting his employer's reasonable expectations represent an imperfect attempt at analogy with *McDonnell Douglas*.

Id. at 1505.

The Second Circuit also rejected the *Loeb* position in *Powell v. Syracuse University*, 580 F. 2d 1150, 1155 (2nd Cir. 1978). The court disagreed with the district court's ruling that the plaintiff had failed to establish a prime facie case because she had failed to establish her qualifications for the job. The circuit court stated such a requirement "unnecessarily collapses the steps suggested by *McDonnell Douglas* by shifting the considerations which are more appropriate to the employer's rebuttal phase to the earlier requirement that the employee demonstrated competence to perform the specified work."

Not only did the Sixth Circuit reject the *Loeb* reasoning in *Cline*, but reiterated that rejection more recently in *Wexler v. White's Fine Furniture, Inc.*, 317 F. 3d 564 (6th Cir. 2003). The Sixth Circuit, citing *Cline*, stated that "a court may not consider the employer's alleged nondiscriminatory reason for taking an adverse employment action when analyzing the prima facie case." *Id.* at 574.

The court in *Wexler* citing *Aka v. Washington Hosp. Ctr.*,

156 F.3d 1284, 1298 (D.C. Cir. 1998), and *MacDonald v. Eastern Wyoming. Mental Health Center*, 941 F.2d 1115, 1121 (10th Cir. 1991),[2] stated that "[a]t the prima facie stage, a court should focus on a plaintiff's objective qualifications to determine whether he or she is qualified for the relevant job." *Id.* at 575.

B. The Decision Below Is Inconsistent With The Prior Reasoning Of This Court.

Not only is the Fourth Circuit's view out of step with other circuits but also with the language of this Court's opinions. *St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502 (1992), a case focused on the intermediate and final phase of the

---

[2]In *MacDonald*, the Tenth Circuit held that the district "court erred in giving dispositive weight to its conclusion that the MacDonalds failed to disprove defendant's reasons for discharge." That court stated:

> Moreover, concluding that the MacDonalds did not establish a prima facie case based on the reasons for their discharge raises serious problems under the *McDonnell Douglas* analysis, which mandates a full and fair opportunity for a plaintiff to demonstrate pretext. Short-circuiting the analysis at the prima facie stage frustrates a plaintiff's ability to establish that the defendant's proffered reasons were pretextual and/or that age was the determining factor. . . .

941 F.2d at 1119.

McDonnell Douglas presumption, stated that formulation "is a *procedural* device, designed only to establish an order of proof and production." *Id.* at 521. The *Hicks* Court assumed that in discipline and discharge cases, the plaintiff need only to prove that he was *qualified* not the level of his performance. *Id.* at 506.

Most recently, this Court in *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133 (2000), directly faced the job performance issue in a termination case. At trial, the employer contended that the employee had been fired due to his failure to maintain accurate attendance records. *Id.* at 142-44. In *Reeves*, this Court dealt with the prima facie case issue stating:

> First, the plaintiff must establish a prima facie case of discrimination. . . . It is undisputed that petitioner satisfied this burden here: (i) at the time he was fired, he was a member of the class protected by the ADEA... (ii) he was [except for the performance issue] otherwise qualified for the position of Hinge Room Supervisor, (iii) he was discharged by respondent, and (iv) respondent successively hired three persons in their thirties to fill petitioner's position.

Id. at 142.

The Sixth Circuit in *Cline* also relied on this Court's decision in *U.S. Postal Service Bd. Of Governors v. Aikens*, 460 U.S. 711 (1978), stating:

> We need look no further than some of the most important Supreme Court cases in this area – scrutinizing not only what the Court

> said, but the trials which it reviewed – to see that this position is the only logical application of the *McDonnell Douglas* test. In *Aikens*, the district court noted Aikens general qualifications and positive employer reviews to conclude initially that Aikens had made out a prima facie case.

Cline, 206 F.2d at 661-62.

Contrary to the reasoning of the courts below, adequacy of work performance is properly the part of defendant's burden of demonstrating a nondiscriminatory reason for the discharge. This is why this Court has taken the position that in making out a claim of discrimination, the prima facie requirement "is not onerous." *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248, 253 (1981).

> The Sixth Circuit in *Cline* explained:
> The district court ignored these precepts when it held that Cline failed to make a prima facie showing. In addition to setting a burden far too high, it conflated the distinct stages of the *McDonnell Douglas* inquiry by using St. Paul's "nondiscriminatory reason" as a predicate for finding Cline to have failed to make a prima facie case. The court found Cline "unqualified" under prong two of the prima facie case because she had not lived up to the promises she made to "exemplify the moral values thought by the Church."... This analysis improperly imported the later stages of the *McDonnell Douglas* inquiry into the prima facie stage.

Id. at 660.

The Sixth Circuit, unlike the Fourth Circuit in this case, held that rather than resolve such an issue at the prima facie stage, "*McDonnell Douglas* requires that the district court consider this dispute at the inquiry's third stage when its role is to decide the "ultimate question" of discrimination." *Id. at* 660. The court in *Cline*, 206 F.2d at 661, concluded that "a court must examine plaintiff's evidence independent of the nondiscriminatory reason 'produced' by the defense as its reason for terminating plaintiff."

Clearly, the court's analysis of the "qualification" factor in this case improperly imported the final inquiry under *McDonnell Douglas* into the prima facie stage. The trial court here used what it describes as "Warch's poor performance, his supervisor's concerns, and efforts made to encourage Warch to elevate his work to OCIC's standards" to conclude that Warch had not met the second (qualification) prong of the prima facie requirement. JA 49-50.

The Sixth Circuit's analysis in *Cline* is particularly instructive because it demonstrates that the decisions below are not consistent with this courts prior analysis and thus bears an extensive quote from that decision:

> The *Hicks* decision confirms the logic of *Aikens* and applies it to the termination context. In that case, after a number of years of successful employment which included a promotion, St. Mary's fired Hicks following a series of disciplinary actions and a demotion. *See* 509 U.S. at 504-05, 113 S.Ct. 2742. The district court nevertheless found him "qualified" for prima facie purposes by looking only at the evidence of Hicks' employment record *prior* to the events that spurred his demotion and

> consequent termination. *See Hicks v. St. Mary's Honor Ctr.*, 756 F. Supp. 1244, 1249 (E.D. Mo. 1991). In other words, the court did not consider Hick's alleged violation of various rules as part of the prima facie case (even though they arguably showed that he was not "qualified," just as Cline's violation of an essential rule allegedly deemed her "unqualified" in St. Paul's eyes), but properly reserved its consideration of those alleged violations until the production stage. . . . Although the Court reversed the court of appeals on the question of whether Hicks met that ultimate burden, the structure of the *Hicks* trial reflects the logic of *Aikens* in the termination context: that whether or not a plaintiff makes a prima facie case must be ascertained by weighing the plaintiff's evidence that she was meeting her employer's legitimate expectations, not by considering the nondiscriminatory reasons produced by the defendant as its reason for terminating her. Moreover, the *Hicks* trial shows that in the termination context, this determination will often involve assessing whether the plaintiff was meeting the employer's expectations *prior* to the onset of the events that the employer cites as its reason for the termination, because weighing the litigants' evidence on the veracity and propriety of that nondiscriminatory explanation comprises the "ultimate issue" of the case.

Id. at 662-63.

The *Cline* court, 206 F.3d at 665, provides logic for its position observing that "[t]he burden-shifting analysis of *McDonnell Douglas* exists, in part, to resolve 'the disparity in access to information between employee and employer regarding the employer's true motives for making the challenged employment decision,'" citing *Walker v. Mortham*, 158 F.3d 1177, 1192 (11th Cir. 1988).

C. The Lower Courts' Decisions Are Erroneous.

As in *Hicks*, the evidence here is that prior to the onset of events that the employer cites as its reasons for terminating Warch, he was meeting the employer's performance expectations. In this case, Larry Warch received from OCIC a rating of "Good" for the performance period of 3/21/00 to 12/31/00 and had thereby received a 3% merit increase. This decision was made by Montgomery and Robert Eades on June 21, 2001. JA 238, JA(S) 326-327. Also Bradley Bennett, who had been Warch's supervisor,[3] stated that "Larry Warch's overall job performance met or rose above Ohio Casualty's reasonable expectations." JA 79.[4]

---

[3]The Bennett Declaration (JA 76-83 at ¶¶ 6, 8, 9, 10 and 12) clearly shows that Bennett was Warch's prior supervisor contrary to the lower court's determination (JA 50-51).

[4]Contrary to the assertion of management suggesting that Warch did not perform thorough investigations, his 1999 performance evaluation stated as one of Warch's strengths that he is "detailed in conducting investigations." JA 315. Likewise, with regard to the quality of Warch's investigations, the performance evaluation stated that he "Exceeds Expectations." JA 314.

In a performance evaluation for the year 2001, Warch received a rating of "Marginal Performance." Def's Ex. 32 (JA 285-289). *See* JA 34. The evaluation was clearly subjective in the most part as to performance criteria. For example, there are criteria dealing with "customer-driven quality," "Innovation," and "Stewardship." JA 286. However, as to the few objective criteria, Warch was rated as "exceeding" expectations. For example, Warch handled 17.0 files per month (the criteria for exceeding expectation was 16 or more). *Id.* Also, Warch was rated as "Exceeding" with regard to training hours. *Id.*

It is also important to note that at the summary judgment stage, the plaintiff need not present a prima facie case of discrimination, but must simply raise a genuine issue of material fact as to the existence of a prima facie case. *Thornbrough v. Columbus & Greenville R. Co.*, 760 F.2d 633, 641 n.8 (5th Cir. 1985).

Part of the error in the reasoning the lower court's opinion in this case is the failure of the opinion to specify what job expectations, objective or subjective, were the basis for the court's conclusion that Warch failed to meet the employer's expectations or, for that matter, which expectations were legitimate.

In *Medina v. Ramsey Steel Co., Inc.*, 238 F.3d 674, 681 (5th Cir. 2001), the court concluded that only "objective qualifications" should be considered at the prima facie stage. The court warned that "[w]hile subjective criteria . . . 'may serve legitimate functions, they also provide opportunities for unlawful discrimination' because the criteria itself may be pretext for age discrimination." Thus, subjective criteria should only be considered later. Most, if not all, of the job performance "problems" the lower court referenced were based upon subjective determinations.

The Seventh Circuit recognized the problems in requiring a plaintiff to demonstrate that he met his employer's job expectations concluding that, at the prima facie stage, an employee need not prove subjective qualifications. *Jayasinghe v. Bethlehem Steel Corp.*, 760 F.2d 132, 134-35 (7th Cir. 1985).

D. The Circuits' Split Should Be Resolved Now.

Because in age discrimination cases the most common explanation that employers offer for terminations or demoting employs is that the employee is guilty of poor performance, this issue affects thousands of individuals seeking judicial relief for claims of age discrimination. This case presents an opportunity for the Court to reject the line of authority embraced by the majority of courts of appeal that the employee need not show that he meets the employer's legitimate job expectations at the prima facie stage or, as petitioner urges, reject the minority view represented by the decision below.

The split in the circuits extends beyond more than two circuits to several other courts of appeal over many years. The conflict is no longer tolerable, and there is a need for a uniform rule to determine when a prima facie case has been established in age discrimination cases. *See Commissioner v. Bilder,* 369 U.S. 499, 501 (1962). The pipeline is replete with many lawsuits affected by this issue. *See Massachusetts Trustees v. United States*, 377 U.S. 235, 237 (1965).

2. Contrary To The Fourth Circuit's Holding, Other Circuits Do Not Require That A Plaintiff Show That He Was Replaced By A Substantially Younger Employee As Part Of A Prima Facie Case.

There is also an apparent conflict between the Fourth

Circuit in this case and other circuits as to the "replacement" issue, which was the second reason for which the district court entered summary judgment for the employer. The Fourth Circuit in this case states that Warch's prima facie case fails because "he did not produce sufficient evidence from which a reasonable jury could conclude that he was replaced by a substantially younger employee." App., infra, 15a.

A. The Fourth Prong Of A Prima Facie Case Must Be Flexible And Vary With The Circumstances.

The Seventh Circuit in *Collier v. Budd Co.*, 667 F.3d 886, 890 (7th Cir. 1995), stated that a prima facie case is a flexible standard and the fourth (replacement) prong of the formulation varies with the circumstances.

The district court ruled that Warch failed to establish a prima facie case also under the fourth element of the *McDonnell Douglas* framework. The district court found that to establish a prima facie case, Warch must also show that he was replaced by someone with comparable qualifications outside the protected class, citing *Causey v. Balog*, 162 F.3d 795, 802 (4th Cir. 1998). However, the district court acknowledged that the Supreme Court has rejected strict adherence to this standard in *O'Connor v. Consolidated Coin Caterers Corp.*, 517 U.S. 308, 312-13, but continued to focus on whether Warch was, in fact, replaced.

The court of appeals stated that Warch initially admitted he was not replaced by anyone but also stated that David Hasler, the head of the department under which the SIU operated at the time of Warch's termination, "testified, however, that Warch's work 'was probably spread out among various investigators' after he was let go. JA 166." The district

court, thus, seemed to hold, as a matter of law, citing *Causey*, 162 F.3d at 802, "that reassignment of a terminated employee's work to existing employees does not satisfy the replacement requirement." *See* JA 53.

In fact, Hasler testified that in December of 2001 "we announced the sale of our New Jersey personal auto business to another company; that was a very significant volume of business." *Id.* at 167. Hasler admitted that at the very time Warch was fired there was a reorganization of the SIU working out of the Voorhees, New Jersey, office. He testified:

> Eventually, the claims on that business would diminish, and the work load of the SIU investigator in New Jersey would go down, so they could pick up part of that. I think that that's initially what we did, was had two or three of the SIU investigators assigned to the Voorhees office that was in the southern part of that region handled SIU cases that may have formerly been referred to Mr. Warch.

Id.

Hasler further explained that "effective March 15 or 16, 2002," shortly prior to Warch's termination, the sale of the New Jersey personal auto business to Performance Insurance Company became effective (*Id. at* 181, 183). According to Hasler, because of this sale "just as the claims staff has been reduced in Voorhees [New Jersey office] knowing that the number of claims is going down, the SIU investigators should have less cases in Voorhees." *Id.* at182.

The sale of the New Jersey personnel auto business, which caused the reduction of the needed SIU investigators,

took place in December of 2001. (JA 182). Warch was placed on probation for his "work product" performance on December 6, 2001, with the stated "consequence of non-improvement being termination. JA(S) 312.

In addition, Bruce Montgomery, the SIU head, and Robert Burgess, Warch's immediate supervisor, viewed older employees stereotypically. Both made very similar statements during the time when Warch was being terminated that people of a certain age (apparently age 46 or above) did not produce like younger people and would not likely be hired to work in the SIU. JA 208-214.

This Court in *Hazen Paper Co. v. Biggins*, 507 U.S. 604, 610 (1993), indicated that the stereotyping of older employees was the focus of the ADEA. There, the Court stated that "[i]t is the very essence of age discrimination for an older employee to be fired because the employer believes that productivity and competence decline with old age." As the court stated in *Zimmitti v. Aetna Life Ins.Co.*, 64 F. Supp. 2d 69, 83 n.29 (D. Conn. 1999):

> As the Supreme Court noted in *Hazen*, the age discrimination that prompted Congress' promulgation of the ADEA " 'rarely was based on the sort of animus motivating some other forms of discrimination, it was based in large part on stereotypes unsupported by objective fact...'" 507 U.S. at 610, 113 S. Ct. 1701 (quoting *EEOC v. Wyoming*, 460 U.S. 226, 231, 103 S. Ct. 1054, 75 L. Ed. 2d 18 (1983)).

After referring to a congressional hearing which prompted a report by the Secretary of Labor, this Court in *EEOC v. Wyoming*, 460 U.S. 226, 231 (1983), concluded:

> (1) Many employers adopt specific age limitations in those States that had not prohibited them by their own antidiscrimination laws, although many other employers were able to operate successfully without them. (2) In the aggregate, these age limitations had a marked effect upon the employment of older workers. (3) Although age discrimination rarely was based on the sort of animus motivating some other forms of discrimination, it was based in large part on stereotype unsupported by objective fact, and was often defended on grounds different from its actual causes. (4) Moreover, the available empirical evidence demonstrated that arbitrary age lines were in fact generally unfounded and that as an overall matter, the performance of older workers was at least as good as that of younger workers. (5) Finally, arbitrary age discrimination was profoundly harmful in at least two ways.

B. The Decisions Below Are Erroneous.

In this case, both Montgomery and Burgess made statements that demonstrated stereotypical age animus. Robert Beasley, who was hired as an SIU investigator at about the same time Warch was fired, testified about conversations he had with both Bruce Montgomery and Robert Burgess near the time of Warch's termination.

Beasley testified that Burgess and Montgomery inquired as to whether he knew of anyone in Western North Carolina who might be interested in an SIU investigator position. JA 204-214. He testified that after finding a potential candidate:

> I called back Mr. Burgess and told him he [Jim Weber] was to fax it [a resume] over to Mr. Montgomery. In that conversation with Mr. Burgess, I told him how old the guy was. I told him where the guy was coming from, that he had been the Chief of Police in Dearborn Heights, Michigan. And his response to me was *it will probably be hard for him to get a job because him and Mr. Montgomery had found out that hiring people at that age, they didn't get the work out of them that they did younger people.*

Id. at 211 (emphasis supplied).

Beasley further testified about Montgomery's identical adverse reaction to hiring a 48-year-old retired police officer. JA 213-214. The district court concluded that the age stereotypical statements made by Burgess and Montgomery were only "stray" comments. JA 57.

One type of circumstantial evidence of intentional discrimination "consists of suspicious timing, ambiguous statements, oral or written, behavior toward or comments directed at other employees in the protected group, and other bits and pieces from which an inference of discriminatory intent might be drawn" *Troupe v. May Dep't Stores Co.*, 20 F.3d 734, 736 (7th Cir. 1994).

As the Seventh Circuit stated in *Dey v. Colt Const. & Devel. Co.*, 28 F.3d 1446, 1459 (7th Cir. 1994), "[s]ummary judgment generally is improper where the plaintiff can show that an employer with discriminatory animus provided factual information or other impute that may have affected the adverse employment action."

In *Shager v. Upjohn Co.*, 913 F.2d 398, 405 (7th Cir. 1990), the court found that the employee's supervisor had set the employee up to fail and influenced the Committee's deliberations by portraying the employee's performance in a poor light. The court thereupon imputed the supervisor's actions to the employer and reversed the district court's grant of summary judgment.

Likewise, in *Wells v. New Cherokee Corp.*, 58 F.3d 233, 238 (6th Cir. 1995), that court said that "courts must consider as probative evidence any statements made by those individuals who are in fact meaningfully involved in the decision to terminate an employee."

There is also evidence that shortly after Montgomery was installed by the company to direct the SIU program, he manipulated the audit process so that Warch would fail the audit. After the reorganization of the SIU and Montgomery became its head in early 2001, Montgomery audited the files of Warch and Evans. Not being satisfied that Warch passed the file audit, Montgomery then intentionally manipulated the audit results to lower Warch's audit score. JA 76, 78-79, 82-83 ¶¶ 5, 9, 12, 22-26. From that time on, Warch was subjected to disparaging and unwarranted criticism of his files.

Bennett testified that Montgomery adjusted the audit program after the first audit result, which was "based on criteria provided in a computer program which was developed and supported by the SIU Guidelines. . .," and resulted in Warch passing the audit. According to Bennett, Montgomery decided to adjust the audit program to reflect a lower scoring for Warch. This resulted in Warch failing. JA 82.

The Second Circuit in *Montana v. First Federal S. & L. of Rochester*, 869 F.2d 100,104 (2nd Cir. 1989), read the

decision in *Furnco Const. Co. v. Waters*, 438 U.S. 567 (1978), as stressing "that the *McDonnell Douglas* analysis is neither 'rigid' nor 'mechanized' and that the primary focus is always whether an employer treats an employee less favorably than other employees for an impermissible reason."

Further, the Seventh Circuit has recognized that the fourth element may take on various formulations. *Cengr v. Fusibond Piping Systems, Inc.* 135 F.3d 445, 451 n.1 (7th Cir. 1998). *See also Moore v. Sears, Roebuck and Co.*, 464 F. Supp. 357, 363 n.7. (N.D. Ga.1979).

When David Hasler was asked if Warch had been replaced by any employee, he stated: "not in that location." When further pressed as to whether Warch had been replaced at any location Hasler, replied: "We added a special investigator, and I guess I'd have to looks at the hire dates for that." This suggests that a "replacement" for the SIU might be at any location. JA 141, 165. But when asked who picked up the work that Warch was doing Hasler responded:

> I think it was probably spread out among various investigators. We had work load changes over time in different locations, depending on what underwriting/production people were doing, where they wanted to concentrate their focus on marketing certain lines of business.

Id. at166-67. The evidence is that those employees who were available were substantially younger than Warch. JA 187-89; JA(S) 107, 316-17.

Warch offered sufficient evidence that the director of the SIU, Bruce M. Montgomery, did not treat age neutrally

when making employment decisions, and a reasonable inference can be drawn from the testimony of Hasler that Warch's territory was subsequently covered by individuals substantially younger than Warch who performed the same responsibilities as Warch. Thus, the fourth element to establish a prima facie case has been satisfied.

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit should be granted.

Dated: May 1, 2006

Respectfully submitted,

LEE BOOTHBY
Counsel of Record for Petitioner
1717 K St., NW, Suite 600
Washington, DC 20036
(202) 466-0976

APPENDIX A

PUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 04-2354

LARRY ALAN WARCH,
Plaintiff-Appellant,

v.

OHIO CASUALTY INSURANCE COMPANY,
Defendant-Appellee,

and

OHIO CASUALTY GROUP,
Defendant.

Appeal from the United States District Court
for the District of Maryland, at Greenbelt.
Richard D. Bennett, District Judge.
(CA-02-3715-8-RDB)

Argued: October 25, 2005
Decided: January 30, 2006

Before MOTZ, TRAXLER, and SHEDD, Circuit Judges.

Affirmed by published opinion. Judge Traxler wrote the opinion, in which Judge Motz and Judge Shedd joined.

OPINION

TRAXLER, Circuit Judge:

Larry Alan Warch brought this action against his former employer, The Ohio Casualty Insurance Company ("OCIC"),

alleging that OCIC unlawfully discriminated against him based on his age when it fired him. The district court granted OCIC's motion for summary judgment. For the reasons discussed below, we affirm.

I.

OCIC fired Warch from his position as fraud investigator on April 26, 2002, when he was age 59. Warch's termination should not have been a surprise. Since at least 2000, Warch's supervisors had been giving him negative feedback. On March 1, 2000, the director of Warch's unit, Bill Johansen, sent Warch a letter following up on "several issues pertaining to [Warch's] performance and efforts." J.A. 274. The letter explained how one of Warch's supervisors had discussed company procedures with him "on several occasions" and how there continued to be "shortcomings" that "adversely impact[ed his] personal performance and that of the unit." J.A. 274. Johansen advised Warch to "adopt immediately all procedures and guidelines." J.A. 274.

Shortly thereafter, OCIC changed its internal management structure, but Warch's performance continued to be a source of concern, even under new supervision. The new head of Warch's unit, Bruce Montgomery, met with Warch and advised him that the files he had turned in "lacked any investigative effort," that he "had little or no communication with the claims reps assigned to the case," that he was not leaving his home to conduct field assignments, that he provided "inappropriate" responses to the claims staff that created complaints, and that he needed to "listen more carefully." J.A. 110. Two months later, Warch received a "Formal Counseling Form" stating that he had failed to conduct thorough, concise, and proper investigations, made recommendations to pay claims without gathering all the facts and using all available tools, and failed to "communicate with claims." J.A. 279. OCIC informed

Warch that he would be placed on probation if he failed to improve.

Improvement did not come and, at the end of 2001, OCIC put Warch on probation for six months due to his unacceptable work product. OCIC required Warch to take corrective action and informed him that he would be terminated if he failed to improve. Although Warch received positive feedback in some areas on his 2001 employee evaluation form, the form also stated that he was "not effective," had failed to produce "the product . . . expected of him," was having a "difficult time with the changes that have been made," and needed to "address his work performance and his interpretation of policy provisions." J.A. 286-87. Warch apparently recognized that his performance was problematic, offering family and personal problems as "an excuse for [his] performance." J.A. 289.

OCIC extended Warch's probation. In response to a question from Warch about details of OCIC's concerns, Montgomery explained to Warch:

> We have identified the problems to you many times and each time you state that you understand and then we receive files with the same problems. I feel at this point that we have been more than fair in identifying the problems, explaining what is needed to correct them and the rest will be up to you. . . .
>
> [T]he problems that we see in your work . . . are across the board. You must improve these issues during this extended probationary period.

J.A. 291. OCIC terminated Warch on April 26, 2002, while he was still on probation.

Warch filed a complaint with the Equal Employment Opportunity Commission ("EEOC") in July 2002. Shortly thereafter, the EEOC issued Warch a right to sue letter and

Warch commenced this action. Warch sued under the Age Discrimination in Employment Act ("ADEA"), which forbids employers from "discharg[ing] any individual . . . because of such individual's age." 29 U.S.C.A. § 623(a)(1) (West 1999). Warch pursues his claim under both the "pretext" approach and the "mixed motive" approach. Specifically, he asserts that OCIC's proffered reason for terminating him was pretext for illegal age discrimination and that, even if OCIC had a nondiscriminatory reason to terminate him, age was a motivating factor in his termination.

The district court granted summary judgment to OCIC. On the pretext approach, the district court held that Warch failed to create any genuine dispute that he was meeting his employer's legitimate job expectations or that he was replaced by a substantially younger employee. On the mixed motive approach, the district court ruled that Warch failed to create any genuine dispute, whether based on direct or circumstantial evidence, that age was a motivating factor in his termination.

II.

We review the grant of summary judgment *de novo*. *See Higgins v. E.I. DuPont de Nemours & Co.*, 863 F.2d 1162, 1167 (4th Cir. 1988). Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c); *see Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). We construe the evidence in the light most favorable to Warch and draw all reasonable inferences in his favor. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986).

III.

Warch's claim under the "pretext" approach derives from *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802-05 (1973), and its progeny. *McDonnell Douglas* established a burden-shifting framework for a plaintiff to demonstrate that the purported reason for an adverse employment action, such as termination, was actually a pre-text for unlawful discrimination. *See Mereish v. Walker*, 359 F.3d 330, 334 (4th Cir. 2004). Under this framework, a plaintiff must first establish a prima facie case of unlawful discrimination by a preponderance of the evidence. *See id.*

Generally speaking, to establish a prima facie case of unlawful age discrimination, Warch must show that (1) he is a member of the protected class; (2) he was qualified for the job and met OCIC's legitimate expectations; (3) he was discharged despite his qualifications and performance; and (4) following his discharge, he was replaced by a substantially younger individual with comparable qualifications. *See O'Connor v. Consolidated Coin Caterers Corp.* , 517 U.S. 308, 312-13 (1996); *Causey v. Balog*, 162 F.3d 795, 802 & n.3 (4th Cir. 1998).

After the plaintiff establishes a prima facie case, the burden shifts to the employer to produce a legitimate, non-discriminatory reason for the termination. *See Mereish*, 359 F.3d at 334. The employer's burden at this stage "is one of production, not persuasion; it can involve no credibility assessment." *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 142 (2000) (internal quotation marks omitted). If the employer meets this burden, "the presumption of discrimination created by the prima facie case disappears from the case" and the plaintiff must prove that the "proffered justification is pretextual." *Mereish*, 359 F.3d at 334; *see also Texas Dept. of Cmty. Affairs v. Burdine*, 450 U.S. 248, 253, 255 (1981).

In this case, the district court granted summary judgment to OCIC on Warch's claim under the pretext approach by finding that he failed to produce sufficient evidence to prove that he was meeting his employer's legitimate job expectations or that he was replaced by a substantially younger employee. We address each conclusion in turn.

A. Legitimate Job Expectations

We first address Warch's claim that the district court erred in considering the question of whether he was meeting his employer's legitimate job expectations during the prima facie case. According to Warch, he should only be required to prove that he was "qualified" for the job. Inquiring whether the employee met his employer's legitimate job expectations, Warch argues, improperly collapses the second stage of the *McDonnell Douglas* framework, where the employer brings forth its legitimate, non-discriminatory reason for the termination, into the prima facie case.

Warch's argument that he only needs to show that he is "qualified" for the job, rather than meeting his employer's legitimate job expectations, is foreclosed by circuit precedent. *See Hill v. Lockheed Martin Logistics Mgmt., Inc.* , 354 F.3d 277, 298 (4th Cir. 2004) (en banc) ("Hill has failed to establish a prima facie case of . . . age discrimination because, by her own admissions . . . she has failed to demonstrate that she was performing her job duties at a level that met Lockheed's legitimate expectations."); *Causey*, 162 F.3d at 802 (requiring proof that the employee "was qualified for the job *and* met the employer's legitimate expectations") (emphasis added).

Furthermore, considering an employer's legitimate expectations comports with the purpose of requiring the establishment of a prima facie case — to screen out those cases whose facts give rise to an inference of nondiscrimination, in other words, to eliminate the most common, nondiscriminatory

reasons for the employer's conduct. *See Miles v. Dell*, 459 F.3d 480, 488 n.5 (4th Cir. 2005) (citing *Burdine*, 450 U.S. 253-54). Where an employer hires a new employee, the focus typically is on the qualifications of the candidates. Where, however, an employer fires an employee, the employer is more likely focused on other aspects of the employment, such as poor job performance or infractions of company rules.

Once a person is hired, the distinction between qualifications and job expectations tends to blur. An employee may be qualified when hired, but could fail either to maintain his qualifications or, more commonly, to meet his employer's legitimate expectations for job performance. *See Loeb v. Textron, Inc.*, 600 F.2d 1003, 1013 n.10 (1st Cir. 1979) (noting that the fact that a plaintiff was initially hired generally indicates that he has the "basic qualifications for the job, in terms of degrees, certificates, skills and experience"). In such cases, the prima facie case requires the employee to demonstrate "that he was 'qualified' in the sense that he was doing his job well enough to rule out the possibility that he was fired for inadequate job performance, absolute or relative." *Id.* at 1013; *see also La Montagne v. American Convenience Prods., Inc.*, 750 F.2d 1405, 1409 n.2 (7th Cir. 1984) ("When an employee of long standing is discharged, the more appropriate concern would appear to be his job performance, into which the question of his qualifications might be seen to merge."). Thus, we hold that courts are not required to focus solely on "qualifications" to the exclusion of the employer's legitimate job expectations when evaluating a plaintiff's prima facie case of unlawful termination.

We also reject Warch's contention that consideration of the employer's legitimate job expectations at the prima facie stage improperly allows consideration of evidence the employer would typically present in the second stage of the *McDonnell Douglas* framework, that is, where the employer offers the

legitimate, nondiscriminatory reason for the termination. In support of this argument, Warch relies on the approach announced in *Cline v. Catholic Diocese of Toledo*, 206 F.3d 651 (6th Cir. 2000), which held that, "when assessing whether a plaintiff has met her employer's legitimate expectations at the prima facie stage of a termination case, a court must examine plaintiff's evidence independent of the nondiscriminatory reason 'produced' by the defense as its reason for terminating plaintiff." *Id.* at 660-61. Because OCIC's proffered reason for terminating him was poor performance, Warch argues the district court erred in considering his job performance at the prima facie stage of the inquiry.

In *Cline*, a Catholic school refused to renew the contract of one of its second-grade teachers after it discovered that she had become pregnant a few months before getting married, in violation of the Church's policy against sexual intercourse outside of marriage. The district court ruled that the teacher had failed to establish a prima facie case of sex and pregnancy discrimination. Specifically, the district court concluded that the teacher could not show she was "qualified" because she had violated her promise to live according to the principles of the Church. The Sixth Circuit reversed, holding that the district court had "conflated the distinct stages of the *McDonnell Douglas* inquiry by using [the school's] 'nondiscriminatory reason' as a predicate for finding Cline to have failed to make a prima facie case." *Id.* at 660. Warch contends that, as his case involves a termination where the employer asserted unsatisfactory job performance as the basis for the discharge, the district court made the same error as the district court in *Cline* by considering OCIC's evidence of Warch's poor work performance at the prima facie stage. Warch argues that the district court should have only allowed introduction of this evidence at the second stage of the *McDonnell Douglas* inquiry.

We disagree. Although the plaintiff's burden is "not onerous," it nevertheless requires him to "prov[e] by the preponderance of the evidence a prima facie case of discrimination." *Burdine*, 450 U.S. at 252-53; *see also St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 506 (1993) ("The plaintiff . . . must first establish, by a preponderance of the evidence, a 'prima facie' case . . . ."); *Mackey v. Shalala*, 360 F.3d 463, 468 (4th Cir. 2004) ("'[T]he plaintiff-employee must first prove a *prima facie* case of discrimination by a preponderance of the evidence.'") (quoting *Evans v. Technologies Applications & Service Co.*, 80 F.3d 954, 959 (4th Cir. 1996)); *Mereish*, 359 F.3d at 334 ("[A]ppellants must first establish a prima facie case of discrimination by a preponderance of the evidence."). And, because a plaintiff must show by a preponderance of the evidence that he met the employer's legitimate job expectations to prove his prima facie case, the employer may counter with evidence defining the expectations as well as evidence that the employee was not meeting those expectations. To require otherwise would turn the plaintiff's burden at the prima facie stage into a mere burden of production, making it "difficult to imagine a case where an employee could not satisfy the 'qualified' [or legitimate expectation] element as defined in *Cline*." *Nizami v. Pfizer Inc.*, 107 F. Supp. 2d 791, 801 n.11 (E.D. Mich. 2000). Diluting this element of the prima facie case "defeats the whole purpose of this first stage of the *McDonnell Douglas* inquiry, which is, after all, to 'create[ ] a presumption that the employer unlawfully discriminated against the employee' by 'eliminat[ing] the most common nondiscriminatory reasons' for the employer's action." *Id.* (quoting *Burdine*, 450 U.S. at 254). In short, we find no impermeable barrier that prevents the employer's use of such evidence at different stages of the *McDonnell Douglas* framework.

Despite our disagreement with *Cline*, however, we are cognizant of the danger that courts might apply the "expectations" or "qualification" element of the prima facie case too strictly in some cases, resulting in the premature dismissal of potentially meritorious claims of unlawful discrimination. *See Cline*, 206 F.3d at 660 ("While the discrete stages [of the *McDonnell Douglas* framework] are meant to facilitate litigants and courts in reaching and resolving that ultimate question of discrimination, when misapplied, they tend to distract courts from the central issue."). A hypothetical raised in *Cline* illustrates the point quite well. *See id.* at 663 n.7.

In the *Cline* hypothetical, a truck driver who loses her driver's license is terminated. A narrow application of the "expectation" or "qualification" element would appear to foreclose the driver from proving her prima facie case, since with no driver's license she would not be able to show that she met the job qualifications or legitimate expectations of her employer for a position as truck driver. Yet, even though the driver's case would never get past the prima facie stage, the employer could have still used the loss of the license as a pretext for illegal discrimination. Evidence tending to show this pretext might be that similarly situated men who lost their licenses were not terminated but, instead, were temporarily suspended until they received new licenses or were transferred to other jobs within the company. *Cline* attempted to remedy this anomaly by looking "at whether an employee met her employer's legitimate expectations *prior* to the event(s) that sparked the termination." *Id.* (emphasis added). Following this lead, Warch argues that prior to the onset of events that OCIC cites as its reasons for terminating him, he was meeting OCIC's performance expectations.

We find this approach to be unworkable, especially where there is no one "event" that "sparked the termination," but instead a long string of performance problems leading up to

firing. The further back in time a court goes to evaluate an employee's performance, the more removed the evidence is from the time of the termination. As we explained in *Lovelace v. Sherwin-Williams Co.*, 681 F.2d 230 (4th Cir. 1982):

> The rationality, hence fairness, of this inference [of unlawful discrimination] obviously decreases as the time gap between last proven satisfactory performance and challenged employment action lengthens. Here, the time lag was almost two years. As common experience in such matters teaches, and as the full record reveals the case here to have been, a great deal can happen to alter things in such a time

Id. at 244. *See also O'Connor v. Consolidated Coin Caterers Corp.*, 56 F.3d 542, 547 (4th Cir. 1995) (holding that a review of an employee's 1989 performance was irrelevant to a determination of whether his performance was satisfactory at the time of his termination in August of 1990), *rev'd on other grounds*, 517 U.S. 308 (1996).

We think the flexibility of the *McDonnell-Douglas* inquiry, when properly applied, already protects plaintiffs from the feared injustice of the *Cline* hypothetical. *See Brinkley v. Harbour Recreation Club*, 180 F.3d 598, 611 (4th Cir. 1999) (holding that "the *McDonnell Douglas* framework should not be applied in a 'rigid, mechanized, or ritualistic' manner") (citations omitted); *cf. Moore v. City of Charlotte*, 754 F.2d 1100, 1105 (4th Cir. 1985) (recognizing that the *McDonnell Douglas* framework is "less useful" in the context of an alleged discriminatory disciplinary decision than in the context of an alleged discriminatory hiring decision). Although on summary judgment an employer is free to assert that the job expectation prong has not been met, nothing prohibits the employee from countering this assertion with evidence that demonstrates (or at least creates a question of fact) that the proffered "expectation"

is not, in fact, legitimate at all. Thus, where application of the qualification or expectation element of the prima facie case seems to preclude an otherwise meritorious claim, the plaintiff is free to demonstrate that the employer's qualifications or expectations are not, in fact, "legitimate."

This flexibility, inherent in the *McDonnell Douglas* framework, is true to the goal of "progressively . . . sharpen[ing] the inquiry into the elusive factual question of intentional discrimination," *Hicks*, 509 U.S. at 506 (internal quotation marks omitted) (alteration in original), and the recognition that the shifting burdens of *McDonnell Douglas* are "meant only to aid courts and litigants in arranging the presentation of evidence," *Watson v. Ft. Worth Bank & Trust*, 487 U.S. 977, 986 (1988). *Cf. Miles*, 429 F.3d at 488-89 (recognizing that there may be circumstances where application of the traditional elements of the prima facie case might improperly screen out cases where a presumption of discrimination could still exist). The same considerations apply to the legitimate job expectations and qualifications prongs of the prima facie case.

We now turn to the question of whether Warch has produced sufficient evidence from which a jury could conclude that he met OCIC's legitimate job expectations. As early as March 2000, before Bruce Montgomery took over as lead of Warch's unit and over two years before Warch was terminated, Warch had already been reprimanded concerning "several issues pertaining to [his] performance and efforts." J.A. 274. His supervisors had advised him "on several occasions concerning [company] procedures" and informed him that he continued to suffer from "shortcomings" that "adversely impact[ed his] personal performance and that of the unit." J.A. 274. Furthermore, after Montgomery took over as the leader of the unit, Warch acknowledged that his own performance failed

to meet OCIC's expectations. *See* J.A. 289 ("I feel an excuse for my performance is necessary. My wife has been ill . . . .").

Warch argues that OCIC's criticisms were too subjective to be considered at the prima facie stage. This complaint will not avail Warch because, if for no other reason, the facts do not support it. OCIC reprimanded Warch based on concrete, specific observations and accompanied its reprimands with explicit instructions on how to improve. For example, although Warch claims the March 2000 letter he received (before Montgomery was his supervisor) dealt only with deficiencies in "file organization" and "office filing procedures, not performance," Brief of Appellant at 23, the letter explicitly addresses "several issues pertaining to [Warch's] *performance* and efforts" and discusses Warch's "shortcomings." J.A. 274 (emphasis added).

Warch similarly contends that counseling he received in May 2001 was not specific and used only general and subjective language. We disagree. The Formal Counseling Form states that Warch was, among other things, "making recommendations to pay claims without gathering all the facts and using all tools given to conduct such investigations" and failing to "communicate with claims." J.A. 279. The form states that Warch's files "lacked any investigation and there was little or no communication with claims." J.A. 279. These are observations of objective facts.

Warch refers to opinions of those who thought he was doing a good job and points to savings he brought the company, arguing that this evidence demonstrates he was meeting OCIC's legitimate performance expectations. As to the opinions, they were offered either by those whose employment with OCIC ended well before Warch's or by third parties who were never employed by OCIC at all. Thus, they lack probative value as to whether Warch was meeting his employer's

legitimate expectations at the time he was fired. *See, e.g.*, *Hawkins v. PepsiCo, Inc.*, 203 F.3d 274, 280 (4th Cir. 2000) (disregarding plaintiff's opinions of her own performance because "[i]t is the perception of the decision maker which is relevant, not the self-assessment of the plaintiff," and finding the opinions of her co-workers "similarly close to irrelevant")(citations and internal quotation marks omitted); *O'Connor*, 56 F.3d at 547 (holding that a review of an employee's 1989 performance was irrelevant to a determination of whether his performance was satisfactory at the time of his termination in August of 1990); *cf. King v. Rumsfeld*, 328 F.3d 145, 149-50 (4th Cir. 2003) (explaining that co-workers' opinions might be relevant in certain situations, but not where they fail to establish what expectations the employer had and whether the employee met them).

Warch also claims he was in the upper third of performers in 2001 based on total savings by investigator. This evidence, even if true, is simply not enough to genuinely dispute the considerable evidence of Warch's repeated failures and negative performance. Faced with such abundant evidence, Warch cannot create a genuine dispute concerning his prima facie case by cherry-picking the record to find one isolated instance where he arguably performed better than the average employee.

Nor has Warch shown that OCIC's expectations were a "sham designed to hide the employer's discriminatory purpose," *Brummett v. Lee Enterprises, Inc.*, 284 F.3d 742, 745 (7th Cir. 2002), or were somehow not "legitimate." Thus, even when viewing the evidence in the light most favorable to Warch, we conclude that no reasonable jury would find that he was meeting OCIC's legitimate performance expectations.

B. Replacement

Warch's prima facie case also fails because he did not produce sufficient evidence from which a reasonable jury could conclude that he was replaced by a substantially younger employee. *See Causey*, 162 F.3d at 802 & n.3. Warch argues for a "flexible analysis" of this element of the prima facie case, claiming that his "replacement" could have been at any location. He also contends that, even if no one physically replaced him, he can satisfy this element because he was a victim of a discriminatory reduction in force.

Warch initially admitted that he was not replaced by anyone. J.A. 90 ("I was not replaced by anybody. [My position] was eliminated."); J.A. 262 (statement in post-termination job application). The EEOC similarly explained that Warch "was disciplined prior to his discharge and not replaced." J.A. 302.[1] Nevertheless, Warch argues that David Hasler, one of Warch's supervisors, suggested that a "'replacement' for the SIU unit might be at any location." Brief of Appellant at 40. Hasler also testified, however, that Warch's work "was probably spread out among various investigators" after he was let go. J.A. 166. Warch has failed to present any evidence genuinely disputing this fact, and, in light of his own admissions, he cannot prevail on his argument that he was replaced at all, much less by a substantially younger employee.

Warch submits that Montgomery used the sale of OCIC's New Jersey unit to substantially reduce the number of older employees. Warch points to *Causey v. Balog*, which stated that a plaintiff terminated as part of a reduction in force "could potentially satisfy the fourth element of a prima facie case by introducing other probative evidence that indicates the

---

[1] The district court ruled that this letter was admissible over Warch's hearsay objection. This ruling is not challenged on appeal.

employer did not treat age and race neutrally when making its decision." 162 F.3d at 802.

When OCIC terminated Warch in 2002, it had recently concluded the sale of its line of New Jersey personal automobile insurance policies. OCIC's David Hasler admitted that over time there would probably be less of a need for investigators in Voorhees, New Jersey. Warch argues that OCIC used its need to reduce investigators as a means to eliminate older workers and points to statistics he contends show a discriminatory pattern. He also submits that "logic and fairness" required the termination of two younger New Jersey employees who were less experienced and needed more guidance.

There are several problems with Warch's argument. Perhaps most importantly, Warch has presented no evidence that he was actually terminated as a part of a reduction in force. OCIC never told Warch he was "downsized" or "laid off" because of a loss of business or budgetary needs. *Cf. Causey*, 162 F.3d at 800 (explaining that Causey's employer told him that his position was being abolished due to budgetary constraints). In fact, OCIC's Hasler concluded that, because there were still previously issued policies in place, "there will still be claims on those, and there were open claims on those at the time, so it's hard to estimate how long it would take for all of that business to roll off." J.A. 182. Moreover, Warch's statement that two younger New Jersey investigators should have been terminated instead of him completely ignores his own long string of performance problems.

Warch's argument is based on nothing more than speculation concerning statistically insignificant information. For example, Warch points to numbers showing the firing, retirement, and termination from his unit of selected investigators over the age of forty. His evidence, however, says

nothing about how the turnover rate of overforty employees differed from that of under-forty employees. A reasonable juror simply could not draw the inferences of age discrimination that Warch claims from much of the statistical evidence he submits. For example, Warch lists the names of six investigators he alleges were over the age of 40 who have either been fired, retired with a company recommendation not to hire, or terminated per mutual agreement. But, one of the listed employees was not 40 when terminated, and two of the remaining investigators left OCIC before control of Warch's unit was assumed by Montgomery, allegedly the source of the discriminatory animus. Thus, the evidence is simply not probative enough to create a genuine issue of fact. *See Fisher v. Asheville-Buncombe Tech. Community College*, 857 F. Supp. 465, 470 (W.D.N.C. 1993) (finding plaintiff's statistical evidence "derived from too small a sample" and "simply too speculative" to be probative of alleged age discrimination).

In light of Warch's own admissions that he was not replaced, OCIC's well-documented problems with Warch's performance, and the absence of any evidence showing that he was the victim of a reduction in force, much less a discriminatory one, no reasonable jury could find that Warch could establish the fourth element of his prima facie case.

IV.

Under a "mixed motive" approach, Warch can establish a claim of age discrimination by demonstrating that his age motivated OCIC's decision to terminate him, even though it was not the sole motivating factor. *See Hill*, 354 F.3d at 284. The district court observed that there is some question as to whether a plaintiff claiming age discrimination can use circumstantial evidence when proceeding under a mixed motive framework. *See id.* at 285 n.2; *Mereish*, 359 F.3d at 339-40 (expressing doubt as to whether the more lenient standard of

proof allowed in Title VII claims applied to ADEA claims, but deciding that, even under this more lenient standard, the appellants' claims failed). Like the district court and the court in *Mereish*, we conclude that Warch's claim fails even when both direct and circumstantial evidence are considered.

Direct evidence must be "evidence of conduct or statements that both reflect directly the alleged discriminatory attitude and that bear directly on the contested employment decision." *Taylor v. Virginia Union Univ.*, 193 F.3d 219, 232 (4th Cir. 1999) (en banc) (citation and internal quotation marks omitted). Even if there is a statement that reflects a discriminatory attitude, it must have a nexus with the adverse employment action. *See Brinkley*, 180 F.3d at 608 ("To survive summary judgment on the basis of direct and indirect evidence, Brinkley must produce evidence that clearly indicates a discriminatory attitude at the workplace and must illustrate a nexus between that negative attitude and the employment action.").

The direct evidence presented by Warch on appeal consists of the comments of Montgomery and Robert Burgess, another OCIC employee, that a job candidate who happened to be similar in age and experience to Warch would have a hard time getting a job because "hiring people at that age, they didn't get the work out of them that they did younger people." J.A. 211. Warch presents no evidence showing this comment was more than an isolated event or that it had any nexus with the decision to terminate him.[2]

---

[2] Warch also submitted to the trial court statements allegedly made by Montgomery to Frank Kortyka, an OCIC employee, that he wanted to eliminate older workers and have a younger staff. Warch has not relied on these statements on appeal. As to all of the age-related comments Warch introduced, the district court explained that the exact statements, when they were made, and their context were unclear from the record. The record was clear, however, that none of the statements were directed to Warch or referred directly to him.

As to his circumstantial evidence, Warch claims that Montgomery purposefully rigged a performance audit that Warch originally passed so that it would instead show that he failed. This evidence, however, does not create any inference that age was a motivating factor in Warch's termination. Furthermore, there is no evidence that the other well-documented performance problems Warch encountered were somehow linked to the failed audit score.

Warch also argues that his statistical evidence revealed a pattern of unlawful age discrimination, and alleged that two older employees were "forced out" around the same time that Montgomery made his age-biased comments. On this argument, the district court properly concluded that Warch had not presented "probative circumstantial evidence to show that OCIC acted with discriminatory animus." J.A. 59. Warch's statistics do not show complete information about where the data came from, how many investigators OCIC employed, who supervised them, and, most importantly, as the district court observed, "how many investigators under 40 have left the company during the same time period." J.A. 59. Any suggestion that the two older employees who left OCIC around the same time as Montgomery's alleged comments were victims of age discrimination is pure speculation and, without more evidence, simply cannot create an inference of illegal age discrimination.

Accordingly, even when we consider Warch's circumstantial evidence, he fails to create a genuine dispute on his claim under the mixed motive approach.[3]

---

[3] Our ruling that Warch failed to submit sufficient evidence on his claim under either the pretext or mixed motive approaches makes it unnecessary for us to address the parties' arguments concerning who was the "decisionmaker."

V.

Under either his pretext approach or his mixed motive approach, Warch failed to create a genuine dispute that he was the victim of illegal age discrimination. As a result, we affirm the decision of the district court.

AFFIRMED

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND
NORTHERN DIVISION

Civil Case No. RDB-02-3715

LARRY ALAN WARCH,

Plaintiff,

v.

THE OHIO CASUALTY INSURANCE COMPANY,

Defendant.

MEMORANDUM OPINION

Plaintiff Larry Warch ("Warch" or "Plaintiff") has sued his former employer, The Ohio Casualty Insurance Company ("OCIC" or "Defendant") for alleged age discrimination in violation of the Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. § 621 *et seq.*, and Maryland law. In his Second Amended Complaint, Plaintiff asserts three causes of action based on age discrimination: 1) pretext claim; 2) Maryland state law claim under Section 9(a) of Article 49B of the Annotated Code of Maryland; and 3) mixed-motive claim. Currently pending are the Defendant's Motion for Summary Judgment, Plaintiff's Motion to Strike Certain Exhibits Attached to Defendant's Motion for Summary Judgment, and Defendant's Motion for Leave to File a Response to Plaintiff's Supplementary Response in Opposition to Defendant's Motion for Summary Judgment. The issues have been fully briefed and no hearing is necessary. *See* Local Rule 105.6 (D. Md. 2004). For the reasons set forth below: 1) Plaintiff's Motion to Strike is GRANTED in part and DENIED in part; 2) Defendant's

Motion for Leave to File a Response to Plaintiff's Supplementary Response is MOOT; and 3) Defendant's Motion for Summary Judgment is GRANTED.

BACKGROUND

Warch, a resident of Carroll County, Maryland, began working at OCIC on or about January 1, 1999, when OCIC purchased Warch's employer, American Insurance Company. (Ans. at ¶ 7.) Warch was a Special Investigations Unit ("SIU") investigator with American Insurance Company and he continued to work in the same position at OCIC after the acquisition. An SIU investigator examines potentially fraudulent claims referred from the Claims Department, which regularly handles determinations concerning a policyholder's coverage and attempts to settle claims. While an SIU investigator, Warch worked out of his home and was assigned to OCIC's Raleigh, North Carolina regional office. (Sec. Amed. Compl. at ¶ 7; Ans. at ¶ 7.) Warch, who was born October 17, 1942, was 59 when OCIC terminated his employment on April 26, 2002. (Sec. Amed. Compl. at ¶ 6.)

OCIC asserts that Warch had a long history of job performance issues at OCIC. Warch, however, believes that he had no significant performance problems before March 1, 2001, around the time when Bruce Montgomery became his new supervisor. (Warch Decl. ¶¶ 13,14, 23.) Montgomery became the Director of SIU Field Operation in February 2001. He was about three years younger than Warch.[1] After becoming a supervisor, Montgomery implemented some changes, such as

---

[1] Montgomery passed away some time before Warch commenced this action. (Def.'s Mot. Summ. J. at 22-3.)

requiring a mandatary referral to SIU of all auto theft claims.[2] In addition, he apparently required SIU investigators to make certain determinations as part of their investigation that Warch did not believe SIU investigators were trained to make, such as checking the appraisal on a vehicle. (Warch Decl. ¶ 20.)

David Hasler, who eventually terminated Warch, is Vice President of Corporate Audit at OCIC's home office. Prior to this position, which Hasler took over on April 15, 2001, he managed the Internal Audit Unit ("IAU").[3] The IAU is primarily responsible for accounting and financial auditing. In a meeting on February 20, 2001, all SIU investigators were told that the SIU was going to be managed by Hasler. In addition, SIU investigators were told that Montgomery was going to work to standardize reporting criteria and SIU procedures. To improve SIU performance, Montgomery was also going to implement an audit process for each of the investigators. On March 8, 2001, Montgomery promoted Robert Burgess from SIU investigator to SIU Field Supervisor. Burgess became Warch's immediate supervisor, but because Montgomery believed that Warch had past job performance problems, and because Burgess was in a new role, Montgomery continued to

---

[2] This apparently, according to Warch and a former co-worker, Frank Kortyka, made Montgomery look like a better manager by creating false referral rates. (Warch Decl. ¶¶ 18-19; 21; Kortyka T. 91-93.) These types of cases, however, apparently required very little investigation. (Warch Decl. ¶ 21.) Kortyka was laid off by OCIC in a reorganization and has filed suit in the United States District Court for the Southern District of Ohio against the company alleging age discrimination. From August 2, 1999 to October 24, 2002, Kortyka managed the Internal Investigation Unit ("IIU"), which is responsible for investigating suspected inappropriate conduct by OCIC employees, vendors, and agents, performing background investigations on new employees, and other security related matters.

[3] At some point in time, although it is unclear exactly when, Hasler managed the IIU.

monitor Warch's performance also. Warch contends that he was more experienced than Burgess, making it difficult for Burgess to properly review files kept by experienced SIU investigators, such as himself. (Bradley Bennett Decl. ¶ 30.)

Although Warch contends that he did not have any job performance problems until March 1, 2001, once Montgomery was his supervisor, OCIC's records indicate that a year prior, on March 1, 2000, Bill Johansen, Assistant Vice President and SIU Director in the Claims Department, gave Warch a formal written counseling for failure to follow SIU procedures. (Def.'s Ex. 18.) On August 30, 2000, Warch was warned by Jay Baas, a Raleigh Manager, in an e-mail, directed to Warch and another employee, about entering improper comments into a company case activity system known as "Ace Notes." (Def.'s Ex. 19.)

Warch believes that these reprimands are overstated and that he performed his job satisfactorily. In addition to Warch's own assertions about his job performance, Warch provides statements from his prior "supervisor," Bradley Bennett, who held various positions at OCIC and was an SIU Analyst in OCIC's home office from 1998 until he was terminated on May 1, 2001. Bennett stated that Warch "was qualified and performed above the level acceptable . . ." (Bennett Decl. ¶ 13.) It is unclear, however, exactly which, if any, of Bennett's positions gave him the responsibility of being Warch's supervisor. Although Bennett provides a job description for his SIU Analyst position, this description does not state that Bennett *supervised* SIU investigators. (Bennett Decl. ¶ 8.)

In early 2001, Montgomery allegedly audited Warch's files and then intentionally manipulated the results to lower Warch's audit score. (Bennett Decl. ¶¶ 9, 12, 22-26.) From this time forward, Warch claims that he was treated unfairly, receiving unwarranted criticism of his files. (Pl's Opp'n at 8-11.) One of these criticisms occurred on March 12, 2001, when

Montgomery met with Warch to discuss his job performance issues. On May 24, 2001, Montgomery issued a formal counseling to Warch for "failure to conduct thorough, concise and proper investigation" and "failure to communication with [the] claims [department]." (Def.'s Ex. 22; Warch T. 204-07; Warch Decl. ¶ 15.) Warch contends that this reprimand was unfair because each investigation is unique and may require different information. (Pl.'s Opp'n at 4; Warch Decl. ¶ 15.) Warch was allocated 60 days to improve his performance.

In June 2001, Warch was evaluated on his performance for the period from March 2000 through December 2000. He received an overall rating of "Good" and was awarded a 3% salary increase. (Warch Decl. ¶ 23; Pl.'s Exs. 51 & 81.) Montgomery was apparently one of the decisionmakers for this raise. (Pl.'s Ex. 51.) A month later, however, on July 24, 2001, his counseling period was extended 30 days. During 2001, Warch also apparently saved OCIC $187,897 through his fraud investigations, placing Warch in the upper third of performers for the year based on this criteria. (Pl.'s Ex. 16)

At some later date, Montgomery met with OCIC's Assistant Vice President of Human Resources, Rick Thomas, to discuss Warch's performance problems and, as a result of this discussion, Thomas approved Montgomery's request to put Warch on probation. On December 6, 2001, after reviewing some of Warch's case files with him, Montgomery and Burgess informed Warch that he was being placed on probation for 60 days because his work product was unacceptable.

Warch was counseled about his work performance problems on December 27, 2001, January 4, 2002, and January 18, 2002. In late January 2002, Warch's 2001 performance evaluation was finalized and he received a rating of "Marginal Performance." (Def.'s Ex. 32.) Warch saw this performance review and wrote in the comment section that the "rating is

acceptable." (*Id.;* Warch T. 255-56.) He noted that he appreciated the consideration he had received from OCIC during a difficult period in his life resulting from his wife's illness. (Def.'s Ex. 32) Warch did not suggest that this performance review was based on a discriminatory reason. (Hasler T. 223-24.)

When Burgess audited all the SIU investigators he supervised, in January 2002, he noted that Warch's performance was deficient on certain claims files. (Burgess T. 55-56; Pl.'s Ex. 9.) On January 30, 2002, Warch's probation was extended 30 days. (Def.'s Ex. 33; Warch T. 257-59) Similarly, on March 8, 2002, Warch's probation was extended another 60 days. (Def.'s Ex. 35; Warch T. 268-72.) Warch was informed that his work needed to improve "across the board." (Def.'s Ex. 35) Burgess counseled Warch on March 21 and April 10, 15, and 16, 2002 about ongoing work problems. (Def.'s Exs. 36, 38-41; Warch T. 268-72.)

On April 23, 2002, Montgomery and Burgess met with Warch at a restaurant in Maryland and reviewed his work performance with him. Montgomery extended Warch's probation again until the beginning of June. (Def.'s Ex. 44; Warch T. 303-09.) The next day, Montgomery called Hasler and told him that the meeting "didn't go very well." (Hasler T. 90-96.)

On April 25, 2002, Hasler and Montgomery met in Fairfied, Ohio, where OCIC's home office is located, and Hasler decided that Warch should be terminated because he had failed to improve his work performance. Hasler believed that OCIC had expended an "extraordinary" amount of time and energy on trying to get Warch to improve his work performance. (Hasler T. 121-22.) Hasler was the individual responsible for determining that Warch should be terminated. (*Id.* at 96-97;113.) Warch contends, however, that Montgomery

was so influential in the decision that he was the real decisionmaker. Both Hasler's and Montgomery's signatures appear on Warch's termination notice. (Pl.'s Ex. 19.) Hasler discussed his decision to terminate Warch's employment with Thomas later that day to ensure that Hasler was following OCIC procedures. Thomas approved of Hasler's decision.

On April 25, 2002, Hasler and Montgomery called Warch and told him that they were not satisfied with his performance and gave him the opportunity to resign. Warch did not want to resign and did not change his mind after thinking it over until the next day. On April 26, 2002, Warch was officially terminated for "unsatisfactory performance." (Pl.'s Ex. 18.)

In an e-mail sent by Warch to Thomas and Hasler in June 2002, he claimed that he was a scapegoat for a SIU program that was not functioning well. (Def.'s Ex. 11; Warch T. 131-33.) Warch accused Montgomery of poorly managing the SIU. Warch did not assert at this time, however, that he was terminated because of his age. Warch claimed that he had evidence to show that his poor performance was fabricated to cover up Montgomery's incompetence, but he never presented this information to Hasler or Thomas. During the same month, Warch informed OCIC that a former coworker and friend, Frank Kortyka, told him that in February or March 2002, Montgomery made some comment to him concerning getting rid of unidentified older SIU investigators. Kortyka could not remember the context. (Warch T. 58; Kortyka T. 60-61.)

On or about July 23, 2002, Warch filed a charge of discrimination with the Equal Employment Opportunity Commission ("EEOC") claiming that Montgomery stated that he wanted to get rid of older investigators and that he rejected an applicant stating that the applicant was too old. Warch stated that there had been three terminations of individuals "in the 45 to 49 year average in one year since Bruce Montgomery took

over the SIU unit" and that these employees were replaced with younger SIU investigators at a lower salary. (Def.'s Ex. 7; Warch T. 52-53.) Within less than one month, on August 16, 2002, the EEOC sent Warch a letter informing him that it was not going to pursue his claim and issued him a right to sue letter. (Sec. Amed. Compl. at ¶ 14.)

STANDARD OF REVIEW

Rule 56 of the Federal Rules of Civil Procedure provides that summary judgment "shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no *genuine* issue as to any *material* fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c) (emphasis added). In *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986), the Supreme Court explained that only "facts that might affect the outcome of the suit under the governing law" are *material*. *Anderson*, 477 U.S. at 248. Moreover, a dispute over a material fact is*genuine* "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Id.* The court further explained that, in considering a motion for summary judgment, a judge's function is limited to determining whether sufficient evidence supporting a claimed factual dispute exists to warrant submission of the matter to a jury for resolution at trial. *Id.* at 249. In that context, a court must consider the facts and all reasonable inferences in the light most favorable to the nonmoving party. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986).

However, "[w]hen the moving party has met its responsibility of identifying the basis for its motion, the nonmoving party must come forward with 'specific facts showing that there is a genuine issue for trial.'" *White v. Rockingham Radiologists, Ltd.*, 820 F.2d 98, 101 (4th Cir.

1987) (*quoting Celotex Corp. v. Catrett*, 477 U.S. 317, 324 (1986); Fed. R. Civ. P. 56(e)). Thus, Rule 56 mandates summary judgment against a party "who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Celotex Corp.*, 477 U.S. at 322. If the evidence presented by the nonmoving party is merely colorable, or is not significantly probative, summary judgment must be granted. *Anderson*, 477 U.S. at 249-50. Similarly, the existence of a mere "scintilla" of evidence in support of the nonmoving party's case is insufficient to preclude an order granting summary judgment. *Id.* at 252. Furthermore, District Courts have an "affirmative obligation . . . to prevent 'factually unsupported claims and defenses' from proceeding to trial." *Felty v. Graves-Humphreys Co.*, 818 F.2d 1126, 1128 (4th Cir. 1987) (*citing Celotex Corp.*, 477 U.S. at 323-24).

A genuine issue of material fact may exist if the evidence presented to the court is sufficient to indicate the existence of a factual dispute that could be resolved in favor of the non-moving party at trial. *Rachael-Smith v. FTDATA, Inc.*, 247 F. Supp. 2d 734, 742 (D. Md. 2003) (*citing Anderson*, 477 U.S. at 248-49). Moreover, any inferences drawn from disputed evidence must be accorded to the non-moving party. *See Matsushita,* 475 U.S. at 587-88; *Pulliam Investment Co., Inc. v. Cameo Properties*, 810 F.2d 1282, 1286 (4th Cir. 1987).

DISCUSSION

I Plaintiff's Motion to Strike

Before reaching the substantive issues raised by Defendant's Motion for Summary Judgment, it is necessary to

first address Plaintiff's motion to strike.[4] Plaintiff moves to strike the affidavits and certain other documents attached to the Defendant's Motion for Summary Judgment. First, Plaintiff moves to strike the entirety of two affidavits, the Affidavit of Gerrie L. Beland and the Affidavit of Robert A. Burgess, on the grounds that they were not based on personal knowledge and contain inadmissible hearsay. Second, Plaintiff moves to strike documents attached to the two affidavits listed above, which are two summaries marked as Exhibit 109 and Exhibit 112. The Plaintiff argues that these exhibits are inadmissible summaries not covered by Rule 1006 and Rule 803(6) of the Federal Rules of Evidence. Third, Plaintiff moves to have two EEOC letters that Defendant obtained through a Freedom of Information Act ("FOIA") request stricken because they are not accompanied by an authenticating affidavit.

A. Affidavits

Plaintiff alleges that the affidavits of Beland and Burgess should be stricken because they do not comply with Federal Rule of Civil Procedure 56(e) in that they are not based on personal knowledge. In *Evans v. Technologies Applications & Service Co.*, 80 F.3d 954 (4th Cir. 1996), referenced in the Plaintiff's motion, the Fourth Circuit explains that the information contained in affidavits submitted in support of or in opposition to a summary judgment motion must be admissible and based on personal knowledge. *See id.* at 962. Summary judgment affidavits cannot be conclusory or based upon hearsay. *Id.* (internal citations omitted). Applying these principles, the Fourth Circuit upheld the lower court's determination to strike certain unsupported, self-serving assertions in the plaintiff's affidavit, as well as statements not

---

[4] The Defendant does not oppose Plaintiff's motion to strike Defendant's Exhibit 28 and, therefore, Plaintiff's motion to strike Exhibit 28 is granted.

based on personal knowledge, or that were hearsay, irrelevant, or conclusory. *See id.* Plaintiff also cites the Fourth Circuit's decision in *Causey v. Balog*, 162 F.3d 795 (4th Cir. 1998), upholding the lower court's decision to strike certain of plaintiff's answers to interrogatories. In *Causey* the Fourth Circuit determined that it was not clear whether some of plaintiff's answers to interrogatories were based on personal knowledge. *Causey*, 162 F.3d at 803 n.4. In the answer at issue, the plaintiff stated "that the City gave some employees raises and hired a new consultant after his termination." *Id.* "Causey's oath state[d] that the answers 'are true to the best of my knowledge, *information and belief*.'" *Id.* (emphasis added).

Beland's and Burgess's affidavits contain statements dissimilar to those stricken in *Evans* and *Causey*. Neither Beland's nor Burgess' affidavit states that the information provided is based on "information and belief," but instead both indicate that the affidavit is based on personal knowledge. Both affidavits also state each employee's position and primary responsibilities at OCIC, which serve as the basis for the information provided. *See Copiers Typewriters Calculators, Inc. v. Toshiba Corp.*, 576 F. Supp. 312, 315-16 (D. Md. 1983) (explaining that even absent traditional litany of personal knowledge and competence to testify, a motion to strike for this reason will fail if these requirement are apparent from the face of the affidavit) (*citing McLaughlin v. Copeland*, 435 F. Supp. 513, 519-20 (D. Md. 1977)). Therefore, the Plaintiff's motion to strike the affidavits of Beland and Burgess is denied.

B. Exhibits Attached to Affidavits

Plaintiff also moves to strike the documents attached to Beland's and Burgess' affidavits. Exhibit 109, attached to the Beland affidavit, is a chart summarizing personnel information of OCIC employees, such as name, department, hiring and termination dates, age, and reason for leaving OCIC. Exhibit

112, attached to the Burgess affidavit, is a summary of scores from audits of SIU files performed by Burgess. Rule 1006 of the Federal Rules of Evidence provides an exception to the "best evidence rule" when the documents are voluminous by enabling a litigant to present the contents of the underlying documents in a chart. *See* Fed. R. Evid. 1006. Under Rule 1006, the underlying documents must be admissible[5] and the underlying materials must be made available for examination by the other party at a reasonable time and place. *See id.* It does not appear from the record that Defendant provided the underlying documents to Plaintiff for his review in a timely fashion, as required by Rule 1006. The Beland affidavit specifically states that the Plaintiff did not request production, during discovery, of some of the underlying documents used to create the summary, marked as Exhibit 109. (Beland Aff. at ¶ 6.) Although both affidavits reference that at least some of the underlaying documents were produced to Plaintiff, neither specify, by document production number or otherwise, what documents were relied upon to make the summaries. (Beland Aff. at ¶ 6; Burgess Aff. at ¶ 7.) Although Defendant first asserted, in a letter to Plaintiff, that Warch had copies of all documents used to generate the summaries, it is evident from later correspondence between the parties that this proved not to be the case. In a letter, dated February 26, 2004, Defendant informed Plaintiff that he did not have sufficient documents to verify the information summarized in Exhibit 109. Similarly, Defendant explained that the Plaintiff, in fact, did not have

---

[5] Defendant asserts that the underlying documents are admissible under Rule 803(6) of the Federal Rules of Evidence, which provides an exception to the hearsay rule allowing business records, that meet the requirements of the rule, to be admitted as evidence.

certain documents used to create Exhibit 112.[6] Although Defendant offers to make these documents available to Plaintiff, upon his request, this offer was not extended until February 26, 2004, at least two weeks after Plaintiff's response opposing Defendant's motion for summary judgment was due to be filed.[7] Therefore, the Plaintiff would not have had the opportunity to verify and challenge the accuracy of these documents prior to the time for filing its response to Defendant's motion. As a result, Plaintiff's motion to strike Exhibit 109 and Exhibit 112 is granted.

C. EEOC Letters

Plaintiff also moves to have two EEOC letters, Exhibit 110 and 111, stricken because these documents are not properly authenticated and contain inadmissible hearsay. Under Rule 902(1) of the Federal Rules of Evidence domestic public documents are self-authenticating if the document bears "a seal purporting to be that of the United States . . . or agency thereof, and a signature purporting to be an attestation or execution." Fed. R. Evid. 902(1). Exhibit 111 is self-authenticating under Rule 902(1) because it is a signed letter from a District Director of the Baltimore Office of the EEOC and bears an EEOC seal. Exhibit 110, however, is not a self-authenticating document under Rule 902(1) because it is an unsigned copy of letter to

---

[6] Defendant asserts that it met its requirement under Rule 1006 because it gave Plaintiff access to review documents that were used to create the summary marked as Exhibit 112. However, this access was provided on July 14, 2003, over five months before the summary at issue was included as an exhibit to Defendant's motion for summary judgment. Plaintiff cannot be required to predict what documents may eventually be relied upon by Defendant to make a summary.

[7] Plaintiff's Response was originally due by January 26, 2004, but the Court granted Plaintiff's request for an extension of time until February 9, 2004.

Warch from an EEOC investigator. Therefore, Plaintiff's motion to strike Exhibit 110 is granted.

Even though Exhibit 111 is self-authenticating, it contains hearsay and, therefore, would be inadmissible unless each instance of hearsay qualifies for an exception. The letter itself qualifies for a hearsay exception under Rule 803(8), which provides that:

> Records, reports, statements, or data compilations, in any form, of public offices or agencies, setting forth (A) the activities of the office or agency, or (B) matters observed pursuant to duty imposed by law as to which matters there was a duty to report, excluding, however, in criminal cases matters observed by police officers and other law enforcement personnel, or (C) in civil actions and proceedings and against the Government in criminal cases, factual findings resulting from an investigation made pursuant to authority granted by law, unless the sources of information or other circumstances indicate lack of trustworthiness.

Fed. R. Evid. 803(8).

However, any hearsay statements included in the letter will also need to qualify as an exception to the hearsay rule to be admissible. *See Lewis v. Velez*, 149 F.R.D. 474, 487 (S.D.N.Y. 1993) (*citing* Fed. R. Evid. 805; *Eng v. Scully*, 146 F.R.D. 74, 79 (S.D.N.Y. 1993)) ("Rule 803(8) does not circumvent the hearsay rule; any double hearsay contained in a report is admissible only if each level of hearsay qualifies independently for a hearsay exception."). An additional level of hearsay exists because the EEOC District Director, who signed the letter, states that he reviewed EEOC records to gather the information provided in the letter. *See Miller v. Field*, 35 F.3d 1088, 1091 (6th Cir. 1994) ("The 'factual findings' in a report qualifying

for a Rule 803(8)(C) exception to the hearsay rule must, however, be based upon the knowledge or observations of the preparer of the report."). These records made by the investigators assigned to Warch's case are also separately covered by Fed. R. Evid. 803(8).

The last level of possible hearsay contained in the letter, Warch's statements documented in the EEOC records, which are specifically referenced in the letter, are not hearsay under evidence Rule 801(d)(2), admission by party-opponent, which provides that a statement offered against a party that is the party's own statement, in either an individual or a representative capacity is not hearsay. Therefore, Plaintiff's motion to strike Exhibit 111 is denied.

II Plaintiff's Citation of Supplemental Authority on Defendant's Motion for Summary Judgment

Plaintiff, although it is not explicitly stated, appears through the language used in its Citation of Supplemental Authority to attempt to employ Federal Rule of Appellate Procedure 28(j)[8] to file this document without asking for leave of the court. Federal Rule of Appellate Procedure 28(j) is inapplicable when a case is pending in district court. Furthermore, Plaintiff has not moved for leave to depart from the filing schedule established by the Court (*see generally*, Local Rule 105.2(a) (D. Md. 2004)) in order to provide additional information and argument in opposition to

---

[8] This rule states, in part: "If pertinent and significant authorities come to a party's attention after the party's brief has been filed--or after oral argument but before decision–a party may promptly advise the circuit clerk by letter, with a copy to all other parties, setting forth the citations. The letter must state without argument the reasons for the supplemental citations, referring either to the page of the brief or to a point argued orally . . . ." Fed. R. App. P. 28(j).

Defendant's motion for summary judgment.[9] Therefore, this Court will not consider Plaintiff's Citation of Supplemental Authority and, as a result, Defendant's Motion for Leave to File a Response to Plaintiff's Supplementary Response in Opposition to Defendant's Motion for Summary Judgment is moot.

III Defendant's Motion for Summary Judgment on Plaintiff's ADEA and State Law Claims

A. ADEA Claims

Warch claims that OCIC violated the ADEA because he was terminated based on his age. The ADEA makes it unlawful for an employer "to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age." 29 U.S.C. § 623(a)(1). "The burden of proof of an age discrimination claim may be satisfied . . . by direct evidence or by circumstantial evidence under a method of proof established by *McDonnell Douglas Corp. v. Green,* 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973)." *Mitchell v. Data General Corp.*, 12 F.3d 1310, 1314 -1315 (4th Cir. 1993). Specifically, "[t]he plaintiff in an ADEA case bears the burden of proving that age was a determining factor in the relevant employment decision." *Mereish v. Walker*, 359 F.3d 330, 334 (4th Cir. 2004).

Generally, a defendant sued for age discrimination can prevail in a motion for summary judgment either 1) by demonstrating that the plaintiff's proffered evidence fails to establish a *prima facie* case of discrimination, or 2) by presenting undisputed evidence showing a legitimate,

---

[9] Plaintiff did not appear to provide the Court with a copy of the unpublished opinion, from the United States District Court for the Southern District of Ohio, referenced in its submission.

nondiscriminatory reason for the adverse employment action. *Malina v. Baltimore Gas and Elec. Co.*, 18 F. Supp. 2d 596, 602 (D. Md. 1998) (internal citation omitted). To avoid summary judgment, the plaintiff must, identify with particularity, admissible evidence of "a stated purpose by the defendant to discriminate on the basis of age" sufficient enough "to permit a reasonable fact finder to reach the conclusion that the reason for the adverse action at issue is intentional age discrimination by the employer." *Id.* at 603. "The evidence must be of sufficient probative force to reflect a genuine issue of material fact." *Id.*

In its recent opinion in *Mereish v. Walker*, the United States Court of Appeals for the Fourth Circuit noted that:

> "We have recognized two ways in which a plaintiff can establish an ADEA claim: first, through evidence showing that age bias motivatedthe employment decision under the so-called 'mixed- motive' method; and second, through circumstantial evidence of discrimination under the 'pretext' method established in *McDonnell Douglas Corp. v. Green* . . . and its progeny."

Mereish, 359 F.3d at 334. The Court noted its earlier *en banc* opinion in *Hill v. Lockheed Martin Logistics Mgmt., Inc.*, 354 F.3d 277, 285 (4th Cir. 2004) (*en banc*).

1. Plaintiff's Pretext Claim

To establish his pretext claim, using the *McDonnell Douglas* framework, Warch must present a *prima facie* case of discriminatory discharge under the ADEA, by meeting the following elements: "(1) he is a member of the protected class; (2) he was qualified for the job and met the employer's legitimate expectations; (3) he was discharged despite his qualifications and performance; and (4) following his

discharge, he was replaced by someone with comparable qualifications outside the protected class." *Causey*, 162 F.3d at 802 (*citing Blistein v. St. John's College*, 74 F.3d 1459, 1467-68 (4th Cir.1996)); *see also Malina*, 18 F. Supp. 2d at 605; *Tuck v. Henkel Corp.*, 973 F.2d 371, 375, (4th Cir. 1992); *Mitchell*, 12 F.3d. at 1315. However, as the Fourth Circuit noted in *Causey v. Balog*, 162 F.3d 795 (4th Cir. 1998), the Supreme Court has rejected strict adherence to the fourth element, outlined above, instead suggesting that replacement by a substantially younger individual would provide a better indicator of an employer's improper discriminatory criterion. *See O'Connor v. Consolidated Coin Caterers Corp.*, 517 U.S. 308, 312-13 (1996); *see also Malina*, 18 F. Supp. 2d at 604 (discussing that, although the Supreme Court partially overruled the Fourth Circuit's holding in *O'Connor v. Consolidated Coin Caterers Corp.*, 56 F.3d 542 (4th Cir. 1995) regarding the final element of proof in a circumstantial case of age discrimination, "it did not address, and hence did not overrule, the Fourth Circuit's analysis of other aspects of age discrimination cases. . . .").

"Under the *McDonnell Douglas* scheme, once the plaintiff proves a *prima facie* case of discrimination, the burden of producing a legitimate explanation shifts to the defendant. If the defendant articulates a legitimate nondiscriminatory explanation which, if believed by the trier of fact, would support the conclusion that discrimination was not a determining factor in the adverse employment decision, the presumption created by the *prima facie* case 'drops from the case,' and the plaintiff bears the ultimate burden to prove that the defendant intentionally discriminated against the plaintiff." *Mitchell*, 12 F.3d at 1314-15 (*citing St. Mary's Honor Center v. Hicks*, 509 U.S. 502 (1993); *Fink v. Western Electric Co.*, 708 F.2d 909 (4th Cir.1983) (adopting the *McDonnell Douglas* scheme for use in ADEA cases)); *see also Texas Dep't of*

Community Affairs v. Burdine, 450 U.S. 248 (1981). In evaluating the defendant's articulated nondiscriminatory reason for the employment decision, the court "does not sit as a kind of super-personnel department weighing the prudence of employment decisions made by firms charged with employment discrimination" so that "when an employer articulates a reason for [its treatment of the plaintiff] not forbidden by law, it is not [the court's] province to decide whether the reason was wise, fair, or even correct, ultimately, so long as it truly was the reason for the plaintiff's termination." *DeJarnette v. Corning, Inc.*, 133 F.3d 293, 298-299 (4th Cir. 1998) (internal quotations and citations omitted). To rebut the defendant's legitimate nondiscriminatory reason, the plaintiff may offer proof that the defendant's explanation was a mere pretext. *Mitchell*, 12 F.3d at 1315.

It is undisputed that Warch is a member of the protected class under the ADEA because he was over 40 years old at the time he was discharged by OCIC, an employer covered by the ADEA. *See id.* (discussing *prima facie* case for age discrimination under the ADEA); *see also Proud v. Stone*, 945 F.2d 796, 797 (4th Cir. 1991) (*citing Fink*, 708 F.2d at 914) ("Any ADEA plaintiff must make the elementary showings that he is a member of the protected group and that he has suffered unfavorable employment action taken by an employer covered by the Act.").

OCIC contends, however, that Warch's pretext claim fails as a matter of law because, based on the undisputed facts in the record, he cannot present evidence to establish two elements of the requisite *prima facie* case. First, OCIC argues that it is clear that Warch was not meeting OCIC's legitimate job expectations and, as a result, he was discharged. *See Proud*, 945 F.2d at 797 (*citing Duke v. Uniroyal, Inc.*, 928 F.2d 1413, 1417 (4th Cir. 1991) (Plaintiff must prove age was "a determining factor" in employer's decision to take adverse action); *Mitchell*, 12 F.3d

at 1314 -1315 (*citing Lovelace v. Sherwin-Williams Co.*, 681 F.2d 230, 238 (4th Cir.1982) (Age must have been a determining factor in the employment decision)). Second, OCIC claims that Warch cannot show that it replaced him with a substantially younger individual.

a. OCIC's Expectations and Warch's Job Performance

OCIC has offered substantial undisputed evidence, discussed *supra* under "Background," that Warch was not meeting its legitimate job performance expectations, chronicling in detail Warch's poor performance, his supervisors' concerns, and efforts made to encourage Warch to elevate his work to OCIC's standards. Warch, argues that he has presented sufficiently probative evidence to dispute OCIC's contentions. In addition, Warch argues that he has established this element of his *prima facie* case by showing that he met OCIC's expectations.

First, Warch basically alleges that OCIC did not have legitimate expectations because Montgomery and Burgess were not qualified and established flawed policies. Warch claims that, under Montgomery's command, SIU investigators were required to undertake tasks that they were not trained to do, such as checking the appraisal on vehicles claimed to be damaged and conducting other tasks that were actually the Claim Department's job. Warch alleges that Montgomery set up a policy where all auto thefts had to be investigated by SIU investigators, but that these types of cases did not require much investigation. In addition, Burgess' inexperience apparently made his audits of the more experienced investigators, such as Warch, flawed. To support these assertions, Warch points, not only to his own opinions, but also those expressed by Bradley Bennett, a former OCIC employee terminated by the company on May 1, 2001. This individual's opinions, who was not qualified as an expert and was only at OCIC two to three

months after Montgomery and Burgess assumed supervisory roles over Warch, is not sufficiently probative evidence to create a genuine dispute of material fact. Similarly, Warch's subjective disagreement with his superiors qualifications, policies, and procedures does not establish that OCIC's expectations were somehow unreasonable and illegitimate. Warch's disapproval of Montgomery's and Burgess' decisions and his perception that they were unfair also does not establish evidence of age animus.

Second, to support that he was meeting OCIC's performance expectations, Warch puts forward statements by Bennett, his supposed previous supervisor, that Warch "was qualified and performed above the level acceptable . . ." (Bennett Decl. ¶ 13.) However, Bennett was terminated May 1, 2001, approximately three months after Montgomery was promoted and two months after Burgess became a supervisor in the SIU unit. Bennett was not employed at OCIC for virtually the whole year leading up to Warch's termination, during the very period in which most of Warch's performance problems occurred. In addition, it does not appear from the record that Bennett was actually Warch's supervisor and, therefore, in a position to truly know about Warch's job performance.

Warch also presents his own contentions that he met OCIC's performance expectiaions. It is well settled, in this Circuit, that Warch's unsubstantiated belief that his work performance was adequate is insufficient to establish a *prima facie* case of discrimination. *See King v. Rumsfeld*, 328 F.3d 145, 149 (4th Cir. 2003); *Evans v. Technologies Applications & Serv. Co.*, 80 F.3d 954, 960 (4th Cir. 1996); *see also Goldberg v. B. Green & Co.*, 836 F.2d 845, 848 (4th Cir. 1988) (stating that the plaintiff's own opinions and conclusory allegations do not have sufficient "probative force to reflect a genuine issue of material fact."). In addition, Warch claims that

his 2000 "Good" performance review and 3% raise indicate that he met OCIC's performance expectation. (Warch Decl. at ¶ 23; Pl.'s Exs. 51 & 81.) However, it is undisputed that the majority of Warch's performance problems occurred in 2001 into 2002, when he was eventually terminated.

Warch asserts that he should be able to survive summary judgment because, during one point in 2001, he was in the upper third of SIU investigators based on financial savings from fraud investigations. (Pl.'s Ex. 16.) The fact that an employee's "performance was comparable to his coworkers' is *not* proof that [his] performance met [his employer's] legitimate job performance expectations." *King*, 328 F.3d at 149. "It is *only* proof that his work looked like that of his coworkers, a fact that, without more, does not bear on the critical inquiry." *Id.; see also Tinsley v. First Union Nat'l Bank*, 155 F.3d 435, 444 (4th Cir. 1998) ("[A]lthough the affidavits put forth by Tinsley document the fact that certain co-workers, Bank customers, and attorneys believed Tinsley was doing a good job, they fail to address whether management honestly believed that Tinsley was doing a good job.").[10] In addition, there is no evidence that OCIC had a savings quota for SIU investigators or that this was somehow a core performance measure when evaluating SIU investigators. Even viewing the facts in the light most favorable to Warch, this Court finds that the large number of undisputed performance reprimands make it such that a reasonable jury could not find that he met OCIC's performance expectations based on this fact alone.

---

[10] In addition, Defendant asserts that none of the co-employees relied upon by Warch to verify his satisfactory work performance were "in a position to evaluate his overall performance at the time any adverse action was taken against him." (Def.'s Summ. J. Mot. at 17.)

a. Replacement by a Substantially Younger Employee

To establish a *prima facie* case, Warch must also show that he was replaced by someone with comparable qualifications outside the protected class. *See Causey*, 162 F.3d at 802. The Supreme Court has rejected strict adherence to this standard, suggesting that replacement by a substantially younger individual would provide a better indicator of an employer's improper discriminatory criterion. *See O'Connor*, 517 U.S. at 312-13); *see also Parrish v. United Steelworkers of Am.*, 1997 WL 355635, at 2 (4th Cir.1997); *Devan v. Barton-Cotton, Inc.*, 1998 WL 183844, at 4 (4th Cir.1998). At issue in this case is whether Warch was, in fact, replaced at all.

Warch has made conflicting statements concerning whether anyone replaced him at OCIC. Warch has stated that he "was not replaced by anybody" at OCIC and that his position was eliminated. (Warch T. 24-25; D. Ex. 3.) However, Warch has also stated that he thought that his position was not replaced in Maryland, but that Wendy Williams, working out of Toledo, Ohio, took his job because she received his company car.[11] (Warch T. 74-76.) Kortyka also has stated that Williams replaced Warch. (Kortyka T. 70.) Warch, however, has not presented information that Williams was servicing his territory or working on cases previously assigned to him. (Warch T. 77.) In fact, he did not think that Williams was qualified to handle the cases that he had covered. *Id.* Warch has not presented any evidence to show that his region, or the 30 to 40 cases he

---

[11] Wendy Williams is 32 years old and was hired as an investigator by OCIC on July 1, 2002. Montgomery, with Hasler's agreement, also decided to hire some additional people to cover the "western group." (Def.'s Mot. Summ. J. at 20; Hasler T. 193, 215-16.) In addition, OCIC hired one new employee, Brian Biggs (28 years old), for the East to replace Wayne Beasley who Montgomery terminated for poor performance after a short time on the job. (Hasler T. 190-92; 217; 228.)

handled as an SIU investigator, were assigned to another employee, let alone a substantially younger employee. In fact, Hasler explained that Warch's cases were "picked up by other - the investigators that still remained" employed. (Hasler T. 244-45.) *See Causey*, 162 F.3d at 802 (explaining that reassignment of a terminated employee's work to existing employees does not satisfy the replacement requirement).

Warch contends that one employee did not have to replace him to satisfy this element of the *prima facie* framework. Warch contends, using Kortyka for support, that OCIC has an "overall staffing" approach (Pl.'s Opp'n at 22), where "you reduce your staffing level by one, and you increase your staffing level by one" and, therefore, Williams replaced Warch. (Kortyka T. 79- 80.) Warch also supports his theory by highlighting that Hasler stated that OCIC did eventually hire more SIU investigators. (Hasler T. at 180.) Warch's theory, that the next SIU investigator hired replaced him, does not comport with the articulated standard that the plaintiff must prove that he was *replaced. See O'Connor*, 517 U.S. at 312-13; *Causey*, 162 F.3d at 802. For positions, such as Warch's, where multiple employees have the same title and responsibility for conducting similar tasks, the replacement requirement would largely be meaningless if it could be automatically met when a company decides an additional worker is needed. Even viewing the facts in the light most favorable to Warch, a reasonable jury could not find that he has proffered sufficient evidence to show that OCIC hired an employee to replace him, let alone establish that he was replaced by a substantially younger worker.

Therefore, Warch has failed to establish a *prima face* case under the *McDonnell Douglas* framework and Defendant's Motion for Summary Judgment is granted as to the first cause of action setting forth a pretext claim.

2. Plaintiff's Mixed-Motive Claim

In his third cause of action, Warch seeks to establish an ADEA claim, alternatively, under the "mixed-motive" method. The "mixed-motive" method was set forth by the Supreme Court in *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989) (O'Connor, J., concurring) pursuant to which, in a mixed-motive case, the burden of persuasion was shifted to the employer only where the plaintiff demonstrated by direct evidence that an illegitimate factor played a "substantial role" in an adverse employment decision. Pursuant to that framework, a plaintiff must prove "through direct evidence that age was a substantial motivating fact in the terminating decision." *Mereish*, 359 F.3d at 339 (*citing Price Waterhouse*, 490 U.S. at 258). If a plaintiff can make this showing, then, to avoid liability, the defendant must prove that it would have made the same decision even if it did not consider the plaintiff's age. *Id.*

In response to the Supreme Court's decision in *Price Waterhouse*, Congress altered the framework, in the Civil Rights Act of 1991, for claims arising under Title VII. *Mereish*, 359 F.3d at 339. Congress lessened the burden of proof required under *Price Waterhouse* for Title VII plaintiffs first, by allowing plaintiffs to put forth both direct and *circumstantial* evidence to show that the defendant acted with discriminatory animus,[12] and second, by disallowing defendants to avoid liability by showing that it would have made the same decision even absent discrimination. *See id.* at 339-40. In *Mereish v. Walker*, the Fourth Circuit noted that it "had not occasion to decide whether the mixedmotive decision under the Civil Rights Act of 1991 applied to the ADEA," although the

---

[12] In *Desert Palace, Inc. v. Costa*, 539 U.S. 90 (2003), the Supreme Court held that direct evidence is no longer necessary in mixed-motive cases alleging employment discrimination under Title VII.

Fourth Circuit has expressed doubt that it does. *Id.* at 340 *(citing* Hill, 354 F.3d at 285 n.2); *see also EEOC v. Warfield-Rohr Casket Co., Inc.*, 364 F.3d 160, 164 n.1 (4th Cir. 2004) (The Fourth Circuit has "previously assumed, without deciding, that direct evidence is still a prerequisite for a mixed-motive analysis in ADEA cases."). Therefore, this Court will analyze Warch's claim under the more stringent *Price Waterhouse* framework, as well as the less stringent mixed-motive method.

Under the more stringent framework, Warch must present direct evidence: "(1) that he . . . is an employee covered by the ADEA; (2) that he . . . suffered an unfavorable employment action by an employer covered by the [A]ct; and (3) that this occurred under circumstances in which the employee's age was a determining factor, in the sense that but for the employee's age, the employee would not have suffered the adverse action." *Malina*, 18 F. Supp. 2d at 605 (*citing Tuck*, 973 F.2d at 374-75; *O'Connor v. Consolidated Coin Caterers Corp.*, 56 F.3d 542, 548 (4th Cir. 1995) *rev'd on other grounds*, 517 U.S. 308 (1996)). The first two elements are undisputed - Warch is an employee covered by the ADEA and he was terminated. Therefore, under this framework, Warch must present "evidence of conduct or statements that both reflect directly the alleged discriminatory attitude and that bear directly on the contested employment decision." *Warfield-Rohr Casket Co., Inc.*, 364 F.3d at 163 *(quoting Fuller v. Phipps*, 67 F.3d 1137, 1142 (4th Cir. 1995), *abrogated by Desert Palace, Inc. v. Costa*, 539 U.S. 90 (2003)).

All statements about age do not automatically carry animus. "[S]tatements about age, unlike statements about race or gender, do not rest on a we/they dichotomy and therefore do not create the same inference of animus" because everyone expects to someday grow old. *Dockins v. Benchmark Communications*, 176 F.3d 745, 749 (4th Cir. 1999); *see also EEOC v. Clay Printing Co.*, 955 F.2d 936, 942 (4th Cir. 1992)

(holding an employer's comment that the employer needed to "attract newer, younger people" and needed "young blood" failed to establish direct evidence of age discrimination); *Birkbeck v. Marvel Lighting Corp.*, 30 F.3d 507, 512 (4th Cir. 1994) (statement by employee in charge of lay-off decision that "there comes a time when we have to make way for younger people" in and of itself creates no inference of age bias, but merely "reflects no more than a fact of life and as such is merely a truism that carries with it no disparaging undertones.") (citation omitted).

Warch presents the following statements that allegedly directly reflect a discriminatory attitude based on age:[13] 1) a statement allegedly made by Montgomery, in February or March 2002, to Kortyka, which Kortyka shared with Warch in June 2002 about getting rid of older workers (Kortyka T. 58.); 2) a statement allegedly made by Montgomery, according to Kortyka, that "he wanted a younger staff and was eliminating older investigators" (Pl.'s Ans. to Def's First Set of Inter., Ans. No. 6); and 3) a statement allegedly made independently by both Montgomery and Burgess to Beasley, another SIU investigator, to the effect "that they were finding out they couldn't get the work out of older people that they could get out of younger people."[14] (Beasley T. 53-56.)

The exact statements, when they were made, and their context is unclear from the record because there are varying reiterations of the statements. What is clear, however, is that

---

[13] Defendant alleges that these statements are inadmissible hearsay. Plaintiff did not address this contention in his response. Although there may be an argument that these statements are inadmissible, the Court will analyze whether they give rise to age animus and whether they bear directly on Warch's termination.

[14] This is the only statement Plaintiff discusses in its Opposition to Defendant's Motion for Summary Judgment.

none of the statements were made to Warch or refer directly to him.[15] There must be some "nexus between the alleged discriminatory statements" and the decision by OCIC to terminate Warch. *O'Connor*, 56 F.3d at 549 *rev'd on other grounds*, 517 U.S. 308 (1996) (*quoting Clay Printing Co.*, 955 F.2d at 942). In *O'Connor* the Fourth Circuit held that a statement made directly to the plaintiff, two weeks prior to his discharge, that "O'Connor, you are too damn old for this kind of work" alone did not meet the requisite nexus between the statement and the alleged discriminatory employment action. *O'Connor*, 56 F.3d at 549 *rev'd on other grounds*, 517 U.S. 308 (1996). "[I]solated and ambiguous statements . . . are too abstract, in addition to being irrelevant and prejudicial, to support a finding of age discrimination." *Id.* at 548-49 (citations omitted).

Warch argues that the statements discussed above bear directly on the contested employment decision because Montgomery and Burgess were the real decision-makers in connection with his termination. In *Russell v. McKinney Hosp. Venture*, the Fifth Circuit discussed that discriminatory comments of another could be attributed to a decision-maker if the decision-maker "rubber stamped" that person's desires because then he would inherit the discriminatory taint. 235 F.3d 219, 226-227 (5th Cir. 2000). Although OCIC states that Hasler determined that Warch should be terminated, Plaintiff contends that he was just the "hatchet man" because Montgomery reported information about Warch's performance to Hasler. (Pl.'s Opp'n at 29.) Both Hasler's and Montgomery's signatures appear on Warch's termination notice, although Montgomery signed a few days after Hasler. (Pl.'s Ex. 19.)

---

[15] It is also noteworthy that, in fact, Montgomery was one of the decision-makers for Warch's 2001 raise, which was based on his performance in 2000. (Pl.'s Ex. 51.)

Hasler has explained, however, that he did not blindly rubber stamp a recommendation by Montgomery, but instead independently determined that OCIC had expended enough resources on Warch's performance problems. (Hasler T. 113, 122.) Hasler also vetted his decision to terminate Warch with Thomas, OCIC's Vice President of Human Resources. (Hasler T. 97-98; 103-05.) In addition, as discussed *supra* in section III.A.1.a., Warch blamed his termination on Montgomery's and Burgess' incompetence, not on his age. (*See e.g.*, Warch T. 255.) Warch has not shown that he would not have been fired, "but for" his age and cannot provide adequate evidence of sufficient probative force to create a genuine issue of material fact. There is no evidence that Hasler or Thomas acted with age animus when they decided to fire Warch for his long record of poor work performance. (Hasler T. 225.) Furthermore, Plaintiff cannot show that Hasler and Thomas merely rubber stamped a specific recommendation by Montgomery to terminate Warch.

Next, this Court will apply the more lenient mixed-motive framework, which would allow Warch to put forth both direct and circumstantial evidence to show that OCIC acted with discriminatory animus. Warch argues that there was a pattern of age discrimination at OCIC, in that six SIU investigators over 40 have left the company since December 1999. (Pl.'s Ex. 87.) Warch does not explain if this sampling was selected from all SIU investigators, in all regions, or who supervised the investigators. Warch does not share how many SIU investigators OCIC employs and how many investigators under 40 have left the company during the same time period. In addition, of the six SIU investigators Warch lists, none were terminated for poor performance, like Warch. Instead, one left as the result of a layoff (who was "recommended for rehire"), at least two decided to take early retirement, and still another quit without good cause. (Pl.'s Ex. 87.) Warch has not presented probative circumstantial evidence to show that OCIC acted with discriminatory animus. After reexamining the facts

surrounding Warch's termination under the more lenient mixed-motive standard, there is no evidence to prove that age was a motivating factor.

Therefore, Defendant's Motion for Summary Judgment is granted as to Warch's third cause of action setting forth his mixed-motive claim.

3. State Law Claim

In his second cause of action, Warch claims that OCIC violated Maryland state law, Section 9(a) of Article 49B of the Annotated Code of Maryland, because it discriminated against him based on his age. Defendant argues that this Court does not have supplemental jurisdiction over this state claim because the provision cited by Warch "does not protect any substantive rights Warch could claim OCIC violated." (Def.'s Mot. Summ. J. at 12.) Warch did not respond to Defendant's argument. Courts in this District have previously held that Article 49B of the Annotated Code of Maryland does not create a private cause of action. *See Malina*, 18 F. Supp. 2d at 611 *(citing Jordan v. CSX Intermodal, Inc.*, 991 F. Supp. 754, 756, n.1 (D. Md.1998)). Therefore, Defendant's Motion for Summary Judgment as to Warch's state claim is granted.

CONCLUSION

For the foregoing reasons, 1) Plaintiff's Motion to Strike is GRANTED in part and DENIED in part ; 2) Defendant's Motion for Leave to File a Response to Plaintiff's Supplementary Response is MOOT; and 3) Defendant's Motion for Summary Judgment is GRANTED. The Court will issue a separate Order consistent with this Opinion.

/s/_____
Richard D. Bennett
United States District Judge

Dated: September 30, 2004

(2)

No. 05-1387

FILED
JUN - 1 2006
OFFICE OF THE CLERK
SUPREME COURT, U.S.

In the Supreme Court of the United States

LARRY ALAN WARCH,
Petitioner,

v.

THE OHIO CASUALTY INSURANCE COMPANY,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF IN OPPOSITION

JAMES ALAN LIPS, SR.
Counsel of Record
RACHEL S. ZAHNISER
TAFT, STETTINIUS & HOLLISTER LLP
425 WALNUT STREET, SUITE 1800
CINCINNATI, OH 45202-3957
(513) 381-2838

Counsel for Respondent
The Ohio Casualty Insurance Company

Becker Gallagher Legal Publishing, Inc. 800.890.5001

PARTIES TO THE PROCEEDING AND CORPORATE DISCLOSURE STATEMENT PURSUANT TO RULE 29.6

The parties to the proceeding are Petitioner Larry Alan Warch and Respondent The Ohio Casualty Insurance Company.

The parent company of The Ohio Casualty Insurance Company is Ohio Casualty Corporation, which is a publicly held corporation owning 10% or more of the stock of The Ohio Casualty Insurance Company. No other publicly held company owns 10% or more of the stock of The Ohio Casualty Insurance Company.

TABLE OF CONTENTS

PARTIES TO THE PROCEEDING AND CORPORATE DISCLOSURE STATEMENT PURSUANT TO RULE 29.6 i

TABLE OF CONTENTS ii

TABLE OF CITED AUTHORITIES iii

STATEMENT OF THE CASE 1

STATEMENT OF THE FACTS 2

REASONS FOR DENYING THE PETITION 5

A. Warch's Second Issue Questioning His Failure To Establish The Replacement Element Of The Prima Facie 5

B. Warch's First Issue Questioning His Failure To Establish The Qualification Element Of The Prima Facie Case 9

1. The First Issue Need Not Be Decided 9

2. Warch Failed To Establish The Qualification Element 10

CONCLUSION 12

TABLE OF CITED AUTHORITIES

CASES

Cengr v. Fusibond Piping Sys., Inc.,
135 F.3d 445 (7th Cir. 1998) 7

Cline v. Catholic Diocese of Toledo,
206 F.3d 651 (6th Cir. 2000) 9, 10

Collier v. Budd Co.,
66 F.3d 886 (7th Cir. 1995) 6

Desert Palace, Inc. v. Costa,
539 U.S. 90 (2003) 1

Lawson v. Murray,
515 U.S. 1110 (1995) 10

McDonnell Douglas Corp. v. Green,
411 U.S. 792 (1973) 1, 8

Montana v. First Fed. Sav. & Loan of Rochester,
869 F.2d 100 (2d Cir. 1989) 7

Price Waterhouse v. Hopkins,
490 U.S. 228 (1989) 1

St. Mary's Honor Ctr. v. Hicks,
509 U.S. 502 (1993) 10

Troupe v. May Dep't Stores Co.,
20 F.3d 734 (7th Cir. 1994) 7, 8

STATUTES

29 U.S.C. § 621 1

STATEMENT OF THE CASE

Petitioner Larry Alan Warch ("Warch") brought this action against his former employer, Respondent The Ohio Casualty Insurance Company ("OCIC"), alleging, *inter alia*, age discrimination in violation of the Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. § 621 *et seq*. Warch responded to OCIC's motion for summary judgment by arguing that he had presented a prima facie case of presumed discrimination under the "pretext" method analysis approved by *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973). Alternatively, Warch argued that he could prove to a reasonable jury by the "direct" method analysis that he was the victim of intentionally motivated discrimination. *See Desert Palace, Inc. v. Costa*, 539 U.S. 90 (2003); *Price Waterhouse v. Hopkins*, 490 U.S. 228, 278 (1989). After analyzing the claim by both methods, the district court granted OCIC's motion for summary judgment. In analyzing the prima facie case requirements of the pretext method analysis, the district court held, and the Fourth Circuit affirmed, that Warch failed to establish the second element that he was meeting OCIC's legitimate job expectations and the fourth element that he was replaced by a substantially younger employee. Applying the direct method analysis, the district court held, and the Fourth Circuit affirmed, that Warch failed to present sufficient direct or circumstantial evidence to permit a reasonable jury to consider whether his age was a motivating factor in the decision to discharge him.

Warch's two issues addressed his prima facie case under the pretext method analysis. No issue was raised to this Court about the direct method analysis.

STATEMENT OF THE FACTS

The Fourth Circuit and the district court found the following facts were undisputed by Warch. On December 1, 1998, OCIC hired Warch as an Investigator in the Special Investigations Unit ("SIU"), the business unit responsible for investigating fraudulent claims, when it purchased the personal lines business unit of his employer, Great American Insurance Company ("GAI"). Warch admitted that he had difficulty changing the work practices he followed with GAI and accepting and/or readily adapting to OCIC's requirements for all of its SIU Investigators.

On March 1, 2000, Bill Johansen, Assistant Vice President and SIU Director in the Claims Department, sent Warch a letter following up on "several issues pertaining to [Warch's] performance and efforts," and explaining how one of Warch's supervisors had discussed SIU procedures with him "on several occasions" and how there continued to be "shortcomings" that "adversely impact[ed his] personal performance and that of the unit." JA 274. Johansen directed Warch to "adopt immediately all procedures and guidelines of our SIU." *Id.* On August 20, 2000, another manager warned Warch about improper comments he had entered in the company-wide computerized case activity log.

In February 2001, Bruce Montgomery became the Director of Field Operations for the SIU. Bruce Montgomery required more rigorous standards of performance for SIU Investigators than his predecessor and changed or at least interpreted and applied prior procedures differently. Warch presented no evidence that management applied these standards differently to any other SIU investigator.

On March 12, 2001, Montgomery met with Warch and counseled him on a variety of performance shortcomings, advising him that the files he had turned in "lacked any investigative effort," that he "had little or no communication with the claims reps assigned to the case," that he was not leaving his home to conduct field assignments, that he provided "inappropriate" responses to the claims staff that created complaints, and that he needed to "listen more carefully." JA 276-78. Warch responded that he "understood" and "agreed" that the identified problems existed. *Id.*; JA 109-12.

On May 24, 2001, Montgomery issued a formal counseling to Warch for his "failure to conduct thorough, concise and proper investigations" and "failure to communicate with [the] claims [department]," and OCIC informed Warch that he would be placed on probation if he failed to improve. JA 279.

On December 6, 2001, Montgomery and Robert Burgess, Warch's immediate supervisor, reviewed several of Warch's files with him and placed him on formal probation for 60 days for "work product unacceptable" due to "failure to conduct thorough, concise and factual investigations, failure to acknowledge referrals and provide timely communications to claims reps. Work product unacceptable and not according to policy and procedures." JA 280. Warch did not deny responding that he needed to address several deficiencies.

By mid-January 2002, Warch had been counseled three more times about his work deficiencies. In late January 2002, Burgess, Montgomery, and SIU Manager David Hasler finalized Warch's performance evaluation for 2001 and agreed to rate him as "Not Effective" in two out of the five major performance categories ("Customer-Driven Quality"

and "Innovation"). He was given an overall performance rating of "Marginal Performance." In the "Employee Comments" section, Warch did not deny his performance deficiencies; he admitted that this "rating is acceptable"; and he offered family problems as "an excuse for [his marginal] performance." JA 289.

On January 30, 2002, Montgomery extended Warch's probation by 30 days, and on March 8, 2002, he extended it again for 60 days, explaining:

> We have identified the problems to you many times and each time you state that you understand and then we receive files with the same problems. I feel at this point that we have been more than fair in identifying the problems, explaining what is needed to correct them and the rest will be up to you.
>
> . . . [T]he problems that we see in your work . . . are across the board. You must improve these issues during this extended probationary period.

JA 291.

By mid-April, Warch had been counseled five more times in writing for his continuing work deficiencies. On April 23, 2002, Montgomery and Burgess once again reviewed Warch's performance, and Montgomery again extended Warch's probation to June 6, 2002, for: "Continuing failure to conduct thorough, concise, and proper investigations. Making recommendations to pay claims without gathering all the facts and using all tools given to conduct such investigations. Failure to communicate timely with claims." JA 297.

On April 25, 2002, when Montgomery reported Warch's negative response to his April 23 probation renewal to SIU Manager Hasler, Hasler decided to cancel Montgomery's latest probation extension and discharge Warch for "unsatisfactory performance," effective April 26, 2002, explaining:

> I determined that we had given--we had spent all the time we could afford to spend to get an employee's performance up to an acceptable level, and we have taken all of the steps that we could take and not seen any indication that performance was going to get to that level, which is why I decided to terminate Mr. Warch.

JA 157-58.

REASONS FOR DENYING THE PETITION

The sole contention for invoking this Court's jurisdiction on both issues listed below was that the Fourth Circuit's decision conflicts with decisions by other circuits of the court of appeals. Warch has failed to show such conflicts justifying this Court's review of either issue. Since the second issue should be so obviously denied certification and such denial would moot the first issue, the second issue will be initially addressed.

A. Warch's Second Issue Questioning His Failure To Establish The Replacement Element Of The Prima Facie.

Warch's second issue challenged the Fourth Circuit's holding that he failed to establish the fourth prima facie case requirement that he was "replaced" by a substantially younger

employee. Warch cited no case from any other circuit conflicting with the Fourth Circuit's holding in the context of his individual discharge. Warch's reliance on *Collier v. Budd Co.*, 66 F.3d 886 (7th Cir. 1995), to establish such a conflict is misplaced. The Seventh Circuit acknowledged that replacement of an older employee by a younger employee satisfies the fourth element of the prima facie case except when the termination was due to a reduction in force, noting that: "Generally, when a company reduces or restructures its work-force, it does not simply hire a new person to fill the discharged employee's old position." *Id.* at 890.

Warch is entitled to no such relief from the requirement that as a dischargee for poor performance he must show he was replaced by a substantially younger employee before a presumption of discrimination is established. The Fourth Circuit affirmed the district court's fact-based determination that Warch was not terminated as part of a workforce reduction, stating:

> Warch has presented no evidence that he was actually terminated as a part of a reduction in force. OCIC never told Warch he was "downsized" or "laid off" because of a loss of business or budgetary needs. In fact, OCIC's Hasler concluded that, because there were still previously issued policies in place, "there will still be claims on those, and there were open claims on those at the time, so it's hard to estimate how long it would take for all of that business to roll off."

Pet. App. 16a (internal citations omitted).

The Fourth Circuit also found that Warch did not show he was replaced, "much less by a substantially younger

employee." Pet. App. 15a. Warch argued that the reassignment of his caseload to existing employees established the replacement element, but the petition presented no issue relating to this principle that has been dealt with by many circuit courts and resolved in favor of OCIC's position. Even if raised in the petition, such fact-based determinations do not warrant this Court's review. Sup. Ct. R. 10 ("A petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law.").

Unable to cite a circuit court decision permitting an employee discharged for poor performance to be relieved of establishing that he was replaced by a substantially younger employee,[1] Warch argued his same circumstantial evidence of age discrimination--ageist statements allegedly made by Montgomery and Burgess and alleged manipulation of a performance audit by Montgomery to lower Warch's audit score--should be sufficient to establish the fourth element of the prima facie case. In support of this argument, Warch relied on dictum in *Troupe v. May Department Stores Co.*, 20 F.3d 734, 736 (7th Cir. 1994). However, the Seventh Circuit

---

[1] *Cengr v. Fusibond Piping Systems, Inc.*, 135 F.3d 445 (7th Cir. 1998), does not address the replacement element; plaintiff's claim was denied for failure to establish he was meeting his employer's legitimate performance expectations. *Id.* at 453 n.4. In *Montana v. First Federal Savings and Loan of Rochester*, 869 F.2d 100, 104 (2d Cir. 1989), the court rejected a requirement that plaintiff establish the replacement element after she was terminated through a reduction-in-force and structural reorganization. Neither *Cengr* nor *Montana* held that an employee discharged for poor performance was relieved of his obligation to establish he was replaced by a substantially younger employee in order to create a prima facie case of presumed discrimination.

did not hold that circumstantial evidence could be used to establish the replacement element. Rather, this evidence was identified as the first of three types of evidence necessary to prove discrimination "because of" age. The second type of evidence identified was that similarly situated employees outside the protected class received better treatment. *Id.* The third type was "evidence that the plaintiff was qualified for the job in question but passed over in favor of (***or replaced by***) a person not having the forbidden characteristic and that the employer's stated reason for the difference in treatment is unworthy of belief, a mere pretext for discrimination"--*i.e.*, the *McDonnell Douglas* burden-shifting approach. *Id.* (emphasis added).

Troupe confirms that Warch's proposed use of circumstantial evidence of discriminatory motive to satisfy the replacement element of the prima facie case should not be considered prior to the pretext analysis. Neither the district court nor the Fourth Circuit reached the pretext analysis because no prima facie case was established.

Furthermore, the Fourth Circuit and district court considered and rejected Warch's circumstantial evidence under the more lenient "mixed motive" analysis used in non-age discrimination cases. Pet. App. 19a ("[E]ven when we consider Warch's circumstantial evidence, he fails to create a genuine dispute on his claim under the mixed motive approach."). Warch's petition did not raise an issue about the Fourth Circuit's rejection of his circumstantial evidence of intentional discrimination.

By offering this same evidence as a substitute for establishing the replacement requirement, Warch attempted to have the Court conflate both: (i) the prima facie case requirements of the pretext method analysis with the

requirements of the direct motive analysis, and (ii) the prima facie case requirements necessary to ultimately shift the burden on Warch to show by such evidence that OCIC's reasons for his discharge were pretextual. Such conflation would completely undermine the two methods of analyzing discrimination claims which have been approved and fine-tuned over more than the past 30 years to guide the judicial analysis of discrimination claims.

Since Warch cannot show there is a conflict in the circuits raised by the Fourth Circuit's decision that he failed to establish the indispensable element of replacement, the petition must be dismissed for failure to establish a prima facie case.

B. Warch's First Issue Questioning His Failure To Establish The Qualification Element Of The Prima Facie Case.

1. The First Issue Need Not Be Decided.

Even if, *arguendo*, the Fourth Circuit's decision that Warch failed to establish the second element of the prima facie case requirement, that he was qualified for his job, conflicts with the Sixth Circuit's holding in *Cline v. Catholic Diocese of Toledo*, 206 F.3d 651 (6th Cir. 2000) and other decisions, the issue is moot in this case. Regardless of how the Court would resolve this issue, it would not permit Warch's complaint to be reinstated.

This Court has recognized that even where a circuit court's decision is in conflict with another circuit court, a petition for a writ of certiorari should not be granted if the court below provided an alternate ground allowing the Court to dispose of the case without reaching the merits of the

disputed issue. *See Lawson v. Murray*, 515 U.S. 1110, 1116 (1995) (Scalia, J., concurring). This is such a case.

2. Warch Failed To Establish The Qualification Element.

Even if the Court were to relieve Warch of failing to establish the replacement element of a prima facie case and accept review of one or more aspects of Warch's "qualification" issue, his claim could not survive because he failed to present any competent evidence that he was meeting OCIC's legitimate performance expectations at any relevant time during his employment.

Relying on *St. Mary's Honor Center v. Hicks*, 509 U.S. 502 (1993),[2] and *Cline*, Warch contended that he met OCIC's performance expectations prior to the events leading up to his termination--presumably, before Montgomery became the head of the SIU. In support of his argument, Warch pointed to his overall performance rating of "Good" for the period of March 21, 2000 to December 31, 2000, and his 3% merit increase. Warch ignored the facts that he complained about this appraisal and salary increase and considered his rating "minimal." JA 238-39.

The undisputed and admitted objective, competent evidence cited in the statement of facts, *supra*, demonstrates

---

[2] Warch's petition read *Hicks* too broadly. In *Hicks*, the petitioners did not challenge the district court's finding that the respondent satisfied the prima facie case, and therefore this Court did not address whether the respondent was required to show that he was meeting his employer's performance expectations prior to the events leading to his termination or at the time of his termination. *Hicks*, 509 U.S. at 506.

that Warch was not meeting OCIC's legitimate performance expectations either prior to this evaluation or during the 15 months leading up to his discharge.

The Fourth Circuit properly rejected Warch's argument that OCIC improperly used only subjective criteria to evaluate his performance, finding:

> Warch argues that OCIC's criticisms were too subjective to be considered at the prima facie stage. This complaint will not avail Warch because, if for no other reason, the facts do not support it.
>
> * * * *
>
> Warch similarly contends that counseling he received in May 2001 was not specific and used only general and subjective language. We disagree.

Pet. App. 13a (internal citations omitted). This fact-based ruling does not warrant this Court's review. Sup. Ct. R. 10. Furthermore, no issue was raised regarding this holding.

CONCLUSION

For the foregoing reasons, Warch has failed to carry his burden of demonstrating "compelling reasons" for the petition to be granted, and it should be denied. Sup. Ct. R. 10.

Respectfully submitted,

JAMES ALAN LIPS, SR.
Counsel of Record
RACHEL S. ZAHNISER
TAFT, STETTINIUS & HOLLISTER LLP
425 Walnut Street, Suite 1800
Cincinnati, OH 45202-3957
(513) 381-2838

Counsel for Respondent
The Ohio Casualty Insurance Company

May 31, 2006